Supreme Court, U.S.
FILED
971441 MAR 2 1998
OFFICE OF THE CLERK

No. 97-___

In The

Supreme Court of the United States

October Term, 1997

RICKY BELL, WARDEN,

Petitioner,

v.

WILLIAM E. GROSECLOSE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN KNOX WALKUP
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General
Counsel of Record

GORDON W. SMITH
Associate Solicitor General

Office of the Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243-0497
(615) 741-4150
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

206 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does a federal habeas court have the authority to hold an evidentiary hearing to develop facts that were not developed by the habeas petitioner in support of the same legal claims in state court, absent compliance with the cause and prejudice standard applied by this Court in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), and to ignore the state courts' fact-findings entitled to a presumption of correctness under 28 U.S.C. § 2254(d) and *Sumner v. Mata*, 449 U.S. 539 (1981)?

2. Even if the facts produced at the federal evidentiary hearing are considered, did the courts below misapply *Strickland v. Washington*, 466 U.S. 668 (1984), by finding a Sixth Amendment violation where, but for counsel's errors, there is no reasonable probability that the outcome of either the guilt or sentencing stage of the trial would have been different?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

I. Procedural History 1

II. Facts Relevant to the Petition 3

III. The Opinions Below 10

REASONS FOR GRANTING THE WRIT 12

I. THE COURTS BELOW HAVE REFUSED TO FOLLOW DISPOSITIVE PRECEDENT FROM THIS COURT INTERPRETING THE PROPER MEANING AND APPLICATION OF 28 U.S.C. § 2254 IN CASES WHERE A HABEAS PETITIONER HAS FAILED TO DEVELOP FACTS IN PRIOR STATE COURT PROCEEDINGS TO SUPPORT HIS CLAIM OF CONSTITUTIONAL ERROR 12

II. EVEN IF THE FACTS PRODUCED AT THE FEDERAL EVIDENTIARY HEARING ARE CONSIDERED, THE COURTS BELOW MISAPPLIED *STRICKLAND V. WASHINGTON* BY FINDING A SIXTH AMENDMENT VIOLATION WHERE THERE WAS NO REASONABLE PROBABILITY OF PREJUDICE AT EITHER THE GUILT OR SENTENCING STAGE OF GROSECLOSE'S TRIAL 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Groseclose v. State, No. 02C01-9407-CR-00145, 1995 WL 497582 (Tenn.Crim.App. August 23, 1995) 2

Groseclose v. State, No. 33, 1991 WL 27314 (Tenn.Crim.App. March 6, 1991) 2

Groseclose v. State, No. 48, 1987 WL 7007 (Tenn.Crim.App. February 25, 1987) 2

Groseclose v. State, No. 9 (Tenn.Crim.App. February 16, 1984), *cert. denied*, 469 U.S. 1066 (1984) 2

Groseclose v. Tennessee, 454 U.S. 882 (1981) 2

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) 12, 13, 15, 16, 17, 18

Lindh v. Murphy, 117 S. Ct. 2059 (1997) 12, 13

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 17

State v. Groseclose, 615 S.W.2d 142 (Tenn. 1981) 2, 3, 20, 22

Strickland v. Washington, 466 U.S. 668 (1984) .. 15, 18, 19

Sumner v. Mata, 449 U.S. 539 (1981) 12, 13, 17

Thurston Motor Lines, Inc., v. Jordan K. Rand, Ltd., 460 U.S. 533 (1983) 18

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254 .....12, 17

28 U.S.C. § 2254(d) 12, 13, 16

28 U.S.C. § 2254(e)(2) (West 1996) 12, 17

TABLE OF AUTHORITIES – Continued

Page

Tenn. Code Ann. § 39-13-204(i)(4) (1997 Repl.) 2

Tenn. Code Ann. § 39-13-204(i)(5) (1997 Repl.) 2

Tenn. Code Ann. § 39-2402 (repealed)..... 1

Tenn. Code Ann. § 39-2404(i)(4) (repealed) 2

Tenn. Code Ann. § 39-2404(i)(5) (repealed) 2

PETITION FOR A WRIT OF CERTIORARI

The Attorney General and Reporter of the State of Tennessee, on behalf of Ricky Bell, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case vacating respondent's conviction and death sentence.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is published at 130 F.3d 1161. The July 28, 1995 opinion of the district court (App. B) is published at 895 F.Supp. 935. The April 5, 1995 opinion of the district court (App. C) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1997. No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Procedural History

Respondent William E. Groseclose ("respondent" or "Groseclose") was convicted by a jury in 1978 in the Criminal Court of Shelby County, Tennessee, for the offense of murder in the first degree, in violation of Tenn. Code Ann. § 39-2402 (repealed). The jury sentenced him to

death after finding aggravating circumstances that "the defendant employed another to commit the murder for remuneration", Tenn. Code Ann. § 39-2404(i)(4) (repealed) (now § 39-13-204(i)(4) (1997 Repl.)), and that "the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind," Tenn. Code Ann. § 39-2404(i)(5) (repealed) (now § 39-13-204(i)(5) (1997 Repl.)); and that no mitigating circumstances outweighed those aggravating circumstances. The Supreme Court of Tennessee affirmed (*State v. Groseclose*, 615 S.W.2d 142 (Tenn. 1981)), and this Court denied certiorari. (*Groseclose v. Tennessee*, 454 U.S. 882 (1981)). Groseclose thereafter mounted four separate collateral attacks in state court, but relief was denied and the judgments were affirmed on appeal.[1]

On August 15, 1989, Groseclose filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee. By order and memorandum opinion dated April 5, 1995, the district court entered summary judgment in Groseclose's favor on his claims of unconstitutional jury instructions concerning the "heinous, atrocious or cruel" aggravating circumstance, reasonable doubt, and unanimity regarding mitigating circumstances; presentation of false testimony and suppression of material evidence; unconstitutional

---

[1] *Groseclose v. State*, No. 9 (Tenn.Crim.App. February 16, 1984), *cert. denied*, 469 U.S. 1066 (1984) (App. D); *Groseclose v. State*, No. 48, 1987 WL 7007 (Tenn.Crim.App. February 25, 1987); *Groseclose v. State*, No. 33, 1991 WL 27314 (Tenn.Crim.App. March 6, 1991); *Groseclose v. State*, No. 02C01-9407-CR-00145, 1995 WL 497582 (Tenn.Crim.App. August 23, 1995).

involuntary medication; arbitrary review by the Tennessee Supreme Court; and failure to transcribe the closing arguments for appellate review. (App. C) The district court conducted an evidentiary hearing on a variety of other claims. In an order and memorandum dated July 28, 1995, the district court concluded that Groseclose received ineffective assistance of counsel at both the guilt and sentencing phases of his state trial, and that the cumulative effect of the errors for which the court had earlier granted summary judgment deprived him of a fair trial at both phases of his trial. The district court vacated the conviction and death sentence, and directed that a writ of habeas corpus issue unless the State afforded Groseclose a new trial within 120 days. (App. B)

In an opinion filed December 2, 1997, a panel of the United States Court of Appeals for the Sixth Circuit affirmed the judgment, concluding that the district court correctly found that Groseclose was unconstitutionally denied effective assistance of counsel at both the guilt and sentencing phases of his trial. Except for finding Groseclose's double jeopardy claim without merit, the panel pretermitted review of the district court's grant of habeas relief on the remaining claims. (App. A)

II. Facts Relevant to the Petition

1. The proof at Groseclose's trial is accurately summarized in the opinion of the Tennessee Supreme Court on direct appeal. *State v. Groseclose*, 615 S.W.2d at 144-146. For several weeks prior to the homicide, Groseclose planned the death of his wife, Deborah. The record suggests that his motives may have been apprehension that

his wife was planning to divorce him, a desire to obtain substantial life insurance proceeds as a result of her death, interest in another woman, or all three possibilities. In any event, Groseclose contacted Barton Wayne Mount, a naval recruit Groseclose met while employed as a Navy recruiter, in an effort to find someone to murder Mrs. Groseclose. Mount referred Groseclose to an acquaintance, Phillip Michael Britt, who in turn contacted Ronald Eugene Rickman, Britt's former brother-in-law. Rickman agreed to commit the murder in cooperation with Britt. Groseclose agreed to pay a certain price, in which Rickman, Britt, and Mount would all share.

The scheme was for Rickman to accost Deborah the day before the murder and, in an attempt to divert suspicion from Groseclose, to frighten her into reporting the incident to the police. Deborah did report the incident to the police and to her husband, apparently having no suspicion of his involvement. The next day, Groseclose left home early in the morning, taking his infant son with him, but not before ensuring that the back door was unlocked so that the murderers would have no difficulty gaining entry. Shortly after Groseclose left, Rickman and Britt entered the home. They each took turns raping the victim, then permitted her to bathe and dress. Rickman then told her that there was a "contract" on her life. Despite her pleas for life and an offer to pay money to her assailants, Rickman proceeded to strangle Mrs. Groseclose into unconsciousness. After detecting a pulse, Rickman stabbed her three or four times in the back. Believing her to be dead, Rickman and Britt placed Deborah in the trunk of her car and drove to a parking lot adjacent to the main Memphis Public Library. While en route, Rickman heard

Deborah's cries for help emanating from the trunk. Nevertheless, the murderers abandoned the car in the broiling sun. Deborah's badly decomposed body was discovered five days later. Medical testimony revealed that the injuries inflicted by her assailants would not have been fatal. Rather, her death was caused by systemic hyperthermia from the excessive heat, meaning that the victim literally cooked to death.

During the subsequent investigation, police were led to Rickman and Mount through information given by Rickman's roommate. Groseclose, Rickman, Britt, and Mount were jointly indicted for first degree murder. Mount agreed to testify for the State, and his case was severed. Groseclose, Rickman, and Britt were tried jointly and convicted of first degree murder. None of the defendants testified at the guilt phase, but redacted versions of Rickman's and Britt's statements to police were admitted. Outside the presence of the jury, Groseclose testified that, after consultation with his attorney, he did not wish to testify.

At the sentencing phase, Groseclose testified that he had never previously been arrested or indicted for a crime; that he had been assigned to a destroyer during the Vietnam conflict and was wounded in combat; and that he had been awarded, among other things, the Vietnamese Service Medal with three bronze stars and the Good Conduct Medal. Although he admitted having marital and financial difficulties, he testified that there had been improvement in these areas prior to his wife's death. He denied making any arrangements to have his wife murdered. In addition to Groseclose's own testimony, Groseclose presented four other witnesses at the

sentencing hearing, including a neighbor and three employees of the Navy Recruiting Service where Groseclose had worked.

Groseclose and Rickman received death sentences. Britt was sentenced to life imprisonment. Mount ultimately received a ten-year sentence after pleading guilty to second degree murder.

2. At his first state post-conviction proceeding, Groseclose raised a variety of grounds, including the ground of ineffective assistance of counsel. On that ground, two witnesses offered testimony: Groseclose and his trial attorney, Fernand Brackstone. Groseclose testified that Brackstone failed to investigate and formulate a defense at the guilt stage of his trial; failed to meaningfully challenge the State's case at the guilt phase by cross-examination, making pertinent objections, presenting witnesses, and making a closing argument, and at the sentencing phase by putting on meaningful mitigation evidence; and failed to independently represent him, instead simply following the lead of Rickman's attorney.

On the other hand, Brackstone testified that after several meetings with Groseclose, he conducted an independent investigation of the case. This included talking with the State's witnesses, interviewing neighbors, visiting the Groseclose home and the crime scene, reviewing the State's physical evidence, interviewing the codefendants, and talking with Groseclose's fellow employees. Brackstone testified that, apart from showing that Groseclose was not around when his wife was attacked, "there wasn't any other evidence that could have been

presented . . . " and "[N]obody had ever told me about any other witness knowing anything about it."

The state trial record showed that Brackstone cross-examined seventeen witnesses, including Mount, perhaps the most crucial State witness. He testified that he joined co-counsel in making objections when he deemed it appropriate. He acknowledged that he did not present any witnesses at the guilt stage, but he testified that Groseclose never suggested any witnesses that could be called. Brackstone testified that, prior to the sentencing phase, he talked with possible witnesses on the issue of mitigation, but found none to be particularly helpful. Nevertheless, he did present several witnesses at the sentencing phase who testified that Groseclose was able to get along with people, had served his country in the Navy, loved his child, and had straightened out his marital problems.

Other than Groseclose's self-serving, conclusory testimony, no evidence was presented demonstrating that Brackstone's decision to waive closing argument was not simply trial strategy, or that Brackstone abdicated his independent role as counsel and surrendered the defense to co-counsel.

Following the hearing, the state trial court rejected all of Groseclose's claims, finding that Brackstone did not completely turn over the representation of his client to co-counsel, that Brackstone's decision not to produce any proof at the guilt phase was a strategic decision agreed upon by the defense team, that Brackstone produced mitigating evidence at the sentencing phase, and that, after numerous discussions with his client, Brackstone

conducted an adequate investigation of the case. (quoted in App. A, 9-11).

The state appellate court affirmed the trial court in all respects. Regarding Groseclose's claims directed to the guilt phase, the court stated:

> Groseclose testified that his trial lawyer failed to make an independent investigation for the purpose of interposing a defense. The attorney testified he interviewed several witnesses suggested by Groseclose and several not suggested by him. At the post-conviction proceeding, Groseclose testified he wanted the lawyer to call witnesses to show he was not present when his wife was killed. The state's evidence did not suggest Groseclose was present at the time of the offense. The evidence showed he purposely was at the naval base where he had been previously stationed. The evidence which Groseclose wanted shown would not have presented an alibi defense. The lawyer could find no viable defense for Groseclose, and Groseclose did not show in the post-conviction hearing that one existed.
>
> * * *
>
> Basically the thrust of Groseclose's complaint under this heading dealt with the tactical handling of the trial. There is no showing that this amounted to incompetency of counsel.

(App. D, 170-171) Regarding the claims directed at the sentencing phase, the court found:

> Groseclose claims his lawyer was incompetent because he did not present any mitigating circumstances in the punishment phase of the trial. The record shows the attorney called witnesses to testify favorably for Groseclose. Groseclose

> complains because the lawyer did not put members of his family on the stand. Particularly, Groseclose claims he wanted his mother called. This record indicates Groseclose's mother was terminally ill at the time of this trial and unable to attend. She has since died. Significantly, Groseclose, in this post-conviction proceeding, did not show there were any mitigating factors which could have been shown that were not shown. He only argues that the lawyer should have called witnesses from such groups as Tennesseans Against the Death Penalty, Southern Prison Ministries, and the American Civil Liberties Union to show sociological and philosophical reasons why the death penalty should not be inflicted. Such evidence is not admissible.

(App. D, 171-172)

3. Groseclose reiterated his ineffective assistance of counsel claims in his federal habeas corpus petition. Over Warden Bell's objection that Groseclose's failure to develop the record in the state post-conviction proceeding precluded an evidentiary hearing on the claim, the district court granted Groseclose an evidentiary hearing and permitted him to introduce testimony from three "expert" witnesses on the requirements for effective assistance of counsel. These witnesses testified, after simply reviewing the state court record, that Brackstone, *inter alia*, was not "effective"; could have found additional mitigating evidence; did not do anything other than what co-counsel did; offered legal representation that was "constitutionally deficient"; "failed to perform as a reasonably effective attorney in almost every area"; filed only a few pretrial motions where a "normally effective counsel" would file "35 to 50" such motions; failed to

seek a severance when a conflict among the defendants was obvious; was ill-equipped to defend a case because of inexperience and "minimal training of a professional kind"; conducted a "perfunctory" investigation; failed to communicate with his client; "did not comprehend how the mitigation hearing was conducted"; presented mitigation evidence that was counter-productive; failed to adequately cross-examine the State's witnesses; formed a defense theory that amounted to "an admission of defeat"; should have insisted that his client testify; should not have waived argument; became an "ally of the prosecution"; and "abandoned" his client.

In addition to this testimony, Groseclose was permitted to introduce for the first time the testimony of three ministers who could have offered mitigation evidence or could have assisted the defense; and several family members and other witnesses who would have been available to testify at the sentencing phase.

Brackstone was unavailable to testify at the federal hearing due to his death in 1994.

III. The Opinions Below

The district court granted habeas relief on various grounds and vacated Groseclose's conviction and death sentence. With respect to the ground of ineffective assistance of counsel, the district court concluded that trial counsel's performance was deficient for failing to form a working relationship with the client; to investigate the case; to communicate to the client all the evidence against him; to determine mitigating circumstances and to prepare witnesses to testify about them; to file meaningful

pre-trial motions; and to object throughout the proceedings in an effort to protect the record. (App. B, 97-104) The district court also concluded that because counsel failed "to subject the prosecution's case to meaningful adversarial testing" and failed "to function in any meaningful sense as the Government's adversary," prejudice was presumed. (App. B, 105-111)

The district court relied heavily on the testimony at the federal evidentiary hearing. Of the 739 lines of factual findings, 553, or approximately 75 percent, were derived from the testimony adduced at the hearing. Not a single reference to a state court finding of fact is contained in the opinion. Nor did the district court address Warden Bell's objection that Groseclose's failure to present this evidence at the prior state court proceeding barred its presentation at a federal hearing.

A divided panel of the court of appeals affirmed the district court's judgment. Concluding that Brackstone failed to have any defense theory, failed to conduct any meaningful adversarial challenge, and abdicated his client's case to Rickman's counsel, the court affirmed the district court's conclusion that Brackstone's representation was constitutionally deficient. (App. A, 22) However, the court found it unnecessary to address the district court's conclusion that Brackstone's performance was presumed to be prejudicial, concluding that any defense at the guilt phase could have led to a different verdict and that the development of available mitigating evidence could have affected the balance of aggravating and mitigating circumstances. (App. A, 24-25) Like the district court, the court of appeals did not address Warden Bell's objection that Groseclose's failure to present sufficient

evidence to support his claim at the earlier state post-conviction hearing should bar him from developing the proof at a federal hearing. Nor did the court afford the state courts' findings of fact the presumption of correctness, mistakenly concluding that "none of the district court's findings of primary fact is in any measure inconsistent with the state court's findings." (App. A, 11)

REASONS FOR GRANTING THE WRIT

I. THE COURTS BELOW HAVE REFUSED TO FOLLOW DISPOSITIVE PRECEDENT FROM THIS COURT INTERPRETING THE PROPER MEANING AND APPLICATION OF 28 U.S.C. § 2254 IN CASES WHERE A HABEAS PETITIONER HAS FAILED TO DEVELOP FACTS IN PRIOR STATE COURT PROCEEDINGS TO SUPPORT HIS CLAIM OF CONSTITUTIONAL ERROR.

The decisions of both courts below directly conflict with this Court's decisions in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), and *Sumner v. Mata*, 449 U.S. 539 (1981). *Keeney* holds that, under the pre-1996 version of 28 U.S.C. § 2254 which governs this case,[2] a federal habeas petitioner may not obtain relief on a claim previously rejected

---

[2] Because this appeal was pending at the time of the enactment of the habeas corpus reform provisions of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2254 (d) and (e) (West 1996), it is governed by the pre-1996 version of 28 U.S.C. § 2254. *Lindh v. Murphy*, 117 S.Ct. 2059 (1997). Given "the characteristically extended pendency of collateral attacks on capital convictions," (*Id.* at 2069 (Rehnquist, C.J., dissenting)), the pre-1996 version of 28 U.S.C. § 2254 continues to govern large numbers of capital habeas

by a state court because of his failure to present facts in the state forum supporting the claim, unless "he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure." 504 U.S. at 11.[3] And *Sumner* holds that the presumption of correctness required by 28 U.S.C. § 2254(d) must be applied by a habeas court to state trial and appellate court findings of fact, and that a habeas court must include in its opinion granting the writ the reasoning which led it to conclude that the presumption is inapplicable. 449 U.S. at 545-546, 551. Here, Groseclose has obtained precisely the benefit that *Keeney* forbids; and the respondent has been denied the benefit of *Sumner*.

Groseclose presented a claim of ineffective assistance of counsel to the state courts. At his first post-conviction proceeding, Groseclose was represented by two attorneys, who were afforded the opportunity to fully develop the claim. Groseclose attempted to establish the substance of the attorney conduct which the courts below determined to be a violation of the Sixth Amendment. Only two witnesses testified on the issue: Groseclose and Brackstone, his trial attorney. Other than Groseclose's

---

cases as a result of this Court's decision in *Lindh*. The correct resolution of questions arising under the prior statute thus remains of vital importance to the states and capital defendants alike.

[3] The Court also adopted in *Keeney* a narrow exception to the cause and prejudice requirement that will excuse the failure to develop a claim in state proceedings if the habeas petitioner can show that "a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." 504 U.S. at 11.

self-serving and conclusory testimony, no witnesses were called to establish what counsel failed to uncover in his pre-trial investigation, what defense at the guilt phase was available, what witnesses were not presented, what motions or objections could have been filed or raised, how counsel failed to communicate with his client, what mitigation evidence was not presented at the sentencing phase, what arguments could have been made, or how counsel failed to independently represent his client. With Groseclose's testimony offset by Brackstone's, the state trial and intermediate appellate court made findings of fact on the claim. As summarized by the Court of Criminal Appeals in addressing the claims of Groseclose and his codefendant, Rickman:

> The appellants have alleged a great number of deficiencies in their attorneys at the convicting trial. In the issue on appeal, neither has asserted any actual prejudice which resulted. They talk rather of possibilities. In the evidence presented by the appellants at the hearing on the post-conviction petition, neither of them showed that any evidence could have been obtained to support these allegations.
>
> In effect, the appellants ask this Court to invalidate these convictions on suppositions which are not supported by the evidence.
>
> Alleged deficiencies of counsel are not sufficient to obtain the setting aside of a convicting trial. The petitioners must show that the conduct of his [sic] attorney amounted to incompetency under the *Baxter v. Rose* decision, 523 S.W.2d 930 (Tenn. 1975), which follows the United States Supreme Court rule on competency of counsel; they must also show they were prejudiced by

> the action of their attorney. The petitioners have failed in both of these respects.

(App. D, 177-178) The state courts therefore correctly rejected the ineffective assistance of counsel claim on the merits because, without proof of his allegations, Groseclose had failed to carry his burden of showing that counsel's performance was deficient and that the deficiency prejudiced him at either phase of his trial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Keeney binds a habeas petitioner in these circumstances to the record he made in state court, absent a showing of cause for his failure to develop the facts in the state forum and prejudice therefrom, or a fundamental miscarriage of justice. But in this case, without even acknowledging Warden Bell's timely objection that expressly relied on *Keeney*,[4] the district court granted Groseclose the opportunity to present at a federal evidentiary hearing the evidence he failed to develop in state court, made no finding of "cause" and "prejudice" to justify such a hearing, and then used the evidence presented at that hearing to grant relief on Groseclose's ineffective assistance of counsel claim. The district court compounded its error by disregarding the presumption of correctness attached to the fact-findings made by the state courts. Indeed, the district court failed even to acknowledge the state courts' findings, much less to

---

[4] Warden Bell presented his *Keeney* objection to the district court in the amended answer to the petition (R. 130, p. 2).

include in its opinion the reasoning which led it to conclude that the presumption was inapplicable.[5]

Again, on appeal, Warden Bell expressly directed the Sixth Circuit panel's attention to his *Keeney* objection and the district court's failure to afford the state courts' findings the presumption of correctness.[6] In affirming the district court's grant of habeas relief based upon the evidence developed at the federal evidentiary hearing, that court made no mention whatsoever of the *Keeney* objection (or even of *Keeney's* existence) and, while recognizing the general application of the presumption of correctness to a state court's findings of fact, inexplicably concluded that none of the district court's findings were inconsistent with the state courts' findings.[7] (App. A, 11, 20)

The lower federal courts should not be permitted to ignore this Court's prior decisions interpreting the

---

[5] Warden Bell relied on the presumption of correctness in his answer to the petition (R. 12, pp. 12-15, 33-51), a memorandum of law in support of a motion for judgment on the pleadings (R. 23, pp. 1-5), an amended answer to the amended petition (R. 130, pp. 3-4), and a memorandum of law in support of a response to Groseclose's motion for summary judgment. (R. 167, pp. 4-6)

[6] Warden Bell relied on both *Keeney* and the § 2254(d) presumption in his principal brief, in his reply brief, and a third time at oral argument.

[7] The conclusion is demonstrably false. For instance, the district court found that Brackstone "failed to investigate any of the circumstances of the case." (App. B, 97) However, as the court of appeals' opinion itself plainly recites, the state trial court found that Brackstone " 'did[,] after numerous discussions with the petitioner, conduct an investigation of the petitioner's case.' " (App. A, 11 (quoting state court findings))

meaning and proper application of 28 U.S.C. § 2254 (amended 1996). "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). Strict observance of the rules laid down in *Keeney* and *Sumner* is crucial to the achievement of this Court's often repeated goal of reducing the " 'inevitable friction' that results when a federal habeas court 'overturn[s] either the factual or legal conclusions reached by the state-court system'." 504 U.S. at 9 (*quoting Sumner*, 449 U.S. at 550). Moreover, the fact that Congress has now essentially codified *Keeney* in 28 U.S.C. § 2254(e)(2) (West 1996)[8] as a part of the Antiterrorism

---

[8] 28 U.S.C. § 2254(e)(2) (West 1996) now provides:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

and Effective Death Penalty Act of 1996 serves to underscore the importance of the *Keeney* rule as a necessary and salutary limitation on the power of the federal courts to disturb the finality of state court criminal convictions and sentences.

In Groseclose's case, the courts of Tennessee more than a decade ago applied the correct standard established by this Court in *Strickland v. Washington, supra,* and rejected his Sixth Amendment claims because he failed to carry his burden of demonstrating that counsel's performance at either phase of his trial was deficient and that the deficient performance prejudiced his defense. Without the evidence presented at the federal evidentiary hearing, neither the district court nor the court of appeals could have reached a contrary result legitimately. However, both courts disregarded the state courts' determination and have vacated Groseclose's conviction and death sentence almost twenty years after it was imposed based upon evidence presented at a hearing that, *Keeney* teaches, should never have occurred. By disregarding dispositive precedent from this Court, the courts below have so far departed from the accepted and usual course of judicial proceedings as to warrant an exercise of this Court's supervisory power. "Needless to say, only this Court may overrule one of its precedents." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983).

II. EVEN IF THE FACTS PRODUCED AT THE FEDERAL EVIDENTIARY HEARING ARE CONSIDERED, THE COURTS BELOW MISAPPLIED *STRICKLAND V. WASHINGTON* BY FINDING A SIXTH AMENDMENT VIOLATION WHERE THERE WAS NO REASONABLE PROBABILITY OF PREJUDICE AT EITHER THE GUILT OR SENTENCING STAGE OF GROSECLOSE'S TRIAL.

The lower courts further compounded their procedural errors by misapplying the second, or "prejudice", prong of *Strickland v. Washington, supra,* on the merits of Groseclose's Sixth Amendment claim to determine that he had been deprived of the effective assistance of counsel at both guilt and sentencing. Even assuming on the basis of the evidence at the federal hearing that Brackstone's representation was deficient, Groseclose failed to demonstrate, with respect to the conviction, "that there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt," and, with respect to the sentence, that "there is a reasonable probability that, absent the errors, the sentencer – including an appellate court – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington,* 466 U.S. at 695.

The court of appeals curiously characterized the prosecution's evidence linking Groseclose to the perpetrators of the murders as "relatively weak." (App. A, 24-25) On the contrary, as the Tennessee Supreme Court

noted, the evidence of Groseclose's guilt was "overwhelming." *State v. Groseclose*, 615 S.W.2d at 146. The prosecution proved beyond a reasonable doubt that:

- Six or seven months before the murder, Groseclose asked an acquaintance if he would be interested in killing Mrs. Groseclose, and he inquired of another man if he knew somebody who would do some "hit work."

- After Rickman and Britt agreed to carry out the murder, Groseclose took an active part in planning it, personally negotiating the contract price and delivering the money to the hired killers.

- Groseclose insisted that the murder appear to be a "rape-robbery" so that he would not be suspected.

- Groseclose and his wife were experiencing marital and financial difficulties, and Groseclose stood to collect substantial life insurance proceeds in the event of his wife's death.

- Groseclose coolly arranged for Rickman and Britt to wait nearby on the morning of the murder, and upon his signal to them as he left the house with his infant son, they were to enter the home and accost the unsuspecting Deborah Groseclose as she slept.

Despite several post-conviction challenges over the past twenty years, Groseclose has never presented any exculpatory evidence, or any evidence to suggest that Rickman and Britt planned the murder and then sought

to implicate Groseclose to mitigate their own responsibility. The testimony at trial unerringly demonstrates that the murder was committed by Rickman and Britt on behalf of, and after being procured by, Groseclose. Absent Brackstone's alleged errors, there is no reasonable probability that the jury would have had a reasonable doubt as to Groseclose's guilt.

With respect to Brackstone's representation at the sentencing stage, the court of appeals concluded that, in addition to having no criminal record, Groseclose was active in his church, had a positive military record, and had a "plethora" of family members who were willing to testify on his behalf, and that, but for Brackstone's failure to develop those mitigating factors, there is a reasonable probability that the sentencing outcome would have been different. (App. A, 25) For several reasons, the court's analysis is seriously flawed.

First, Groseclose's lack of a criminal record *was* placed before the jury at the sentencing phase. Groseclose testified on direct examination at the sentencing phase that he had never previously been arrested or indicted for a crime. The prosecution did not rebut the evidence on cross-examination.

Second, favorable aspects of Groseclose's military record *were* introduced at the sentencing phase. Groseclose testified that he had been assigned to a destroyer during the Vietnam conflict and was wounded in combat. He testified that he received among other things, the Vietnamese Service Medal with three bronze stars, and the Good Conduct Medal. Again, the prosecution did not challenge this favorable evidence.

Third, the record fails to support the court of appeals' assertion that Groseclose was active in his church. In fact, there was no credible evidence that, before his arrest and conviction, Groseclose was involved in any religious activity. Following his imprisonment, the Church of God licensed him as a minister only "in desperation to get religious services in the Death Row."

Finally, there were legitimate tactical reasons for not introducing character evidence from a myriad of family members. In the event such evidence had been introduced, the prosecution was prepared to respond with evidence assailing Groseclose's "good" character. In the district court, the district attorney testified that the prosecution would have attacked Groseclose's character with a witness who was prepared to testify as to how Groseclose "whipped on" Deborah while she was pregnant.

Groseclose's jury found two aggravating circumstances: (1) Groseclose employed another to commit the murder for remuneration; and (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind. These circumstances were established overwhelmingly. Deborah Groseclose's murder was "one of the most brutal and atrocious imaginable." *State v. Groseclose*, 615 S.W.2d at 145. Groseclose was the mastermind behind the murder of his wife and the mother of his infant child. Given the horrific facts established by the prosecution, there is not a reasonable probability that, absent the errors, the sentencer – including the Tennessee Supreme Court – would have

concluded that the balance of aggravating and mitigating circumstances did not warrant a death sentence.

CONCLUSION

The petition for a writ of certiorari should be granted; the judgment of the court of appeals granting respondent relief on his ineffective assistance of counsel claim should be reversed and the claim dismissed; in the alternative, the case should be remanded to the district court with instructions either to (1) apply the presumption of correctness to the state court findings of fact or (2) state on the record the reasoning leading it to conclude that the presumption is inapplicable, and either to (1) dismiss the ineffective assistance claim unless respondent can establish cause and prejudice in respect of his failure to present evidence supporting that claim in the prior state proceedings or, (2) alternatively, to dismiss the claim without further proceedings.

Respectfully submitted,

JOHN KNOX WALKUP
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General
Counsel of Record

GORDON W. SMITH
Associate Solicitor General

Office of the Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243-0497
(615) 741-4150
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIAM E. GROSECLOSE, *Petitioner-Appellee,*	)	
v.	)	No. 95-6262
RICKY BELL, Warden, *Respondent-Appellant.*	)	

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 89-00662 – John T. Nixon, Chief District Judge.

Argued: April 24, 1997

Decided and Filed: December 2, 1997

Before: KEITH, RYAN, and SUHRHEINRICH, Circuit Judges.

COUNSEL

ARGUED: Gordon W. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant. Larry D. Woods, WOODS & WOODS, Nashville, Tennessee, for Appellee.

ON BRIEF: Gordon W. Smith, Glenn R. Pruden, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, Michael E. Moore,

OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellant. Larry D. Woods, WOODS & WOODS, Nashville, Tennessee, for Appellee.

RYAN, J., delivered the opinion of the court, in which KEITH, J., joined. SUHRHEINRICH, J. (pp. 23-40), delivered a separate dissenting opinion.

OPINION

RYAN, Circuit Judge. Ricky Bell, the warden of the Tennessee Riverbend Maximum Security Institution and the respondent in these proceedings, appeals from the district court's judgment granting a writ of *habeas corpus* to petitioner William E. Groseclose pursuant to 28 U.S.C. § 2254. Although the State of Tennessee presents numerous allegations of error with respect to the various bases for the district court's issuance of the writ, we find only one issue necessary to the resolution of this appeal. Because we conclude that the district court correctly found that Groseclose was unconstitutionally denied effective assistance of counsel under the Sixth Amendment, we will affirm.

I.

A.

In February 1978, William E. Groseclose was convicted in the Shelly County, Tennessee, Circuit Court of murder in the first degree in connection with the killing

of his wife, Deborah Lee Groseclose, on June 29, 1977. Groseclose was alleged to have contacted Barton Wayne Mount, a naval recruit Groseclose met while Groseclose was employed in the Navy Recruiting Service, in an effort to find someone to murder Mrs. Groseclose. *State v. Groseclose*, 615 S.W.2d 142, 144 (Tenn. 1981). Mount referred Groseclose to an acquaintance, Phillip Michael Britt, who in turn contacted Ronald Eugene Rickman, Britt's former brother-in-law. Rickman agreed to commit the murder in cooperation with Britt. Groseclose agreed to pay a certain price, in which Rickman, Britt, and Mount would all share. During its prosecution of the case, the State never ascribed one particular motive to Groseclose, but instead pointed to evidence that "[h]is motives may have been apprehension that [his wife] was about to sue him for divorce, desire to obtain [substantial] life insurance proceeds, or interest in another woman." *Id.*

The Tennessee Supreme Court described the murder as "one of the most atrocious and inhuman conceivable." *Id.* at 145. According to the evidence presented by the State at trial, the scheme was for Rickman to accost Deborah the day before the murder and, in an attempt to divert suspicion for the later murder from her husband, "to frighten her to the point that she would report . . . the incident to the police." *Id.* The next morning, Groseclose left his house with the couple's infant son, leaving the back door unlocked. Rickman and Britt then entered the house; each raped Deborah Groseclose, and then told her "there was a 'contract' on her life." *Id.*

After listening to Deborah plead for her life by offering money to her assailants, Rickman "proceeded to

strangle Mrs. Groseclose into unconsciousness," and then, because he detected a pulse, to stab her three or four times in the back. *Id.* Rickman and Britt placed Deborah in the trunk of her car, apparently believing her to be dead, "and drove the vehicle to a parking lot adjacent to the main Memphis Public Library." *Id.* During the trip, Rickman learned that she was not in fact dead because he "could hear her cries for help from the trunk." *Id.* Rickman and Britt nonetheless left her in the trunk of her car; she was discovered five days later, and the medical testimony at trial suggested that while she would not have died from her injuries alone, the excessive heat in her car trunk caused her death.

During the subsequent investigation, police were led to Rickman and Mount through information given by Rickman's roommate. Although Rickman, Britt, and Mount all gave statements to the police, Groseclose did not. Groseclose, Rickman, and Britt were all charged with murder in the first degree, tried jointly, and convicted.

B.

Jury selection began on February 13, 1978, and was completed on February 17. Groseclose, along with Rickman and Britt, pleaded not guilty. The trial began on February 18 and was concluded on February 28. The sentencing hearing was held between March 1 and March 3. The State presented 39 witnesses during the guilt phase of the trial. None of the defendants testified during the guilt phase. All three defendants were convicted of murder in the first degree. Groseclose and Rickman were then

sentenced to death, while Britt received a sentence of life imprisonment.

Groseclose appealed to the Tennessee Supreme Court, which affirmed his conviction in 1981. *Groseclose*, 615 S.W.2d 142. The U.S. Supreme Court then denied Groseclose's petition for writ of *certiorari*. *Groseclose v. Tennessee*, 454 U.S. 882 (1981). Groseclose next filed a petition for post-conviction relief in January 1982, arguing, *inter alia*, that he had received constitutionally ineffective assistance of counsel. After holding an evidentiary hearing, the trial court denied the petition in December 1982. The Court of Criminal Appeals affirmed the denial in February 1984. *Groseclose v. Tennessee*, No. 9 (Tenn. Crim. App. Feb. 16, 1984). The Supreme Court of Tennessee denied a subsequent application for permission to appeal, and the U.S. Supreme Court denied a petition for writ of *certiorari*. *Groseclose v. Tennessee*, 469 U.S. 1066 (1984).

Groseclose filed a second and third petition for post-conviction relief in the state court, both of which proceeded through the system and were denied. Groseclose also filed a petition for a state writ of *habeas corpus*, which was denied.

Groseclose filed his petition for writ of *habeas corpus* in the U.S. District Court for the Middle District of Tennessee in August 1989. In February and November 1990, the State filed two motions for judgment on the pleadings, alleging that Groseclose had procedurally defaulted on several of his claims. In November 1994, the district court denied these motions. In January 1995, Groseclose filed a motion for summary judgment as to some of his

claims. The district court granted summary judgment with respect to many of Groseclose's claims, but denied it with respect to others, instead granting it, *sua sponte*, to the State. Groseclose has not filed an appeal from those latter rulings, and they are not at issue.

On April 10, 1995, the district court conducted an evidentiary hearing on Groseclose's claims that remained following the summary judgment disposition, and in due course, issued an order directing that a writ issue unless the State afforded Groseclose a new trial within 120 days. *Groseclose v. Bell*, 895 F. Supp. 935 (M.D. Tenn. 1995). The court based its granting the writ on the constitutionally ineffective assistance of Groseclose's trial counsel, and, as an alternative basis, on the cumulative effect of the errors for which the court had earlier granted summary judgment. The court declined to reach, however, an argument by Groseclose that the Shelby County Circuit Court systematically discriminated against blacks and women in the selection of grand jury foremen.

The State filed a motion to alter or amend the judgment, pursuant to Fed.R.Civ.P. 59, which was denied by the district court in August 1995, and then filed this timely appeal. The district court stayed its judgment pending this appeal.

II.

This court reviews *de novo* a district court's disposition of a petition for writ of *habeas corpus*, but nonetheless reviews the district court's factual findings only for clear error. *See McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 2422 (1997). Further, federal

courts must defer to state court factual findings, according a presumption of correctness that the petitioner may rebut only with clear and convincing evidence. *Id.* "The presumption . . . applies to implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility." *Id.* However, "[t]he presumption only applies to basic, primary facts, and not to mixed questions of law and fact," which receive *de novo* review. *Id.*

An ineffective assistance of counsel claim presents a mixed question of law and fact, for which both the state-court and district-court determinations are subject to *de novo* review by this court. *See Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992); *Smith v. Jago*, 888 F.2d 399, 407 (6th Cir. 1989).

> [I]n a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t.]" Rather, . . . it is a mixed question of law and fact. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Strickland v. Washington, 466 U.S. 668, 698 (1984) (citations omitted); *accord McQueen*, 99 F.3d at 1310-11.

In setting forth this applicable standard of review, we take note of the disagreement expressed in the parties' briefs as to the effect of the recent amendments to 28 U.S.C. § 2254 set forth in section 104 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214 (1996). Although the AEDPA became effective on April 24, 1996, and although it mandates significant changes to the federal courts' treatment of both factual and legal issues in the *habeas* setting, the Supreme Court's recent decision in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), instructs that those changes do not apply to this case, or any case pending at the time of the AEDPA's enactment; instead, those changes "generally apply only to cases filed after the Act became effective." *Id.* at 2068. We are, instead, left to apply section 2254(d) as it existed prior to enactment of the AEDPA. See *Id.*

III.

A.

1.

Groseclose's contention that his privately retained trial counsel, Fernand D. Brackstone, had been constitutionally ineffective was initially raised by Groseclose at the time of his first post-conviction proceeding. According to representations made by the State in this appeal, Groseclose based his contention that Brackstone was ineffective on ten separate grounds: (1) the failure of Brackstone to keep Groseclose adequately advised; (2) his failure to investigate and prepare a defense; (3) his failure to file appropriate pretrial motions; (4) his failure to make timely and necessary objections; (5) his failure to conduct

appropriate jury *voir dire*; (6) his failure to call witnesses to impeach prosecution witnesses although requested to do so by Groseclose; (7) his failure to independently represent Groseclose, instead following the lead of Rickman's attorney; (8) his failure to make proper inquiry concerning Groseclose's State-administered medication at trial; (9) his failure to properly communicate with Groseclose after trial; and (10) his failure to request appropriate jury instructions.

The state courts rejected Groseclose's arguments. In formulating its denial, the state trial court explicitly based its findings on "the transcript of th[e] [post-conviction] hearing as well as the trial transcript, pleadings and . . . its own memory as to what transpired during the course of the trial." The court then wrote as follows:

> (2) The Court finds that the attorney of record, Mr. Fernand D. Brackstone, met the legal standard of effective representation in [sic] behalf of the petitioner as required in Tennessee. The alleged failure of Mr. Brackstone to exhaust his peremptory challenges during voir dire does not constitute ineffective assistance. The transcript of the voir dire reveals there was an abundance of information available to Mr. Brackstone to make a proper decision on the qualifications of the prospective jurors. Mr. Brackstone commencing in volume five joins Mr. Adams[, counsel for codefendant Britt,] in objecting to the exclusion of certain jurors by the Court on their views as to considering the death penalty.
>
> (3) The Court finds that Mr. Brackstone in interviewing the petitioner attempted to substantiate the petitioner's position that he was not present during the murder.

. . . .

(5) The Court finds that Mr. Brackstone did not completely turn over the representation of his client to Mr. Robert I. Livingston[, counsel for codefendant Rickman]. Commencing on the second day of the voir dire . . . , the attorneys for all three defendants agreed to work as a team for the benefit of all parties. This continued during the course of the trial.

(6) The Court finds that Mr. Brackstone's representation was not incompetent due to a failure to produce any proof during the guilt phase of the trial. Rather at the close of the State's proof the attorneys agreed to not produce any proof. The petitioner testified in the absence of the jury after a consultation with his fellow co-defendants, their attorneys, and his counsel, Mr. Brackstone, he did not desire to testify in his own behalf. This is set out in the trial transcript.

(7) The Court finds that Mr. Brackstone did produce witnesses during the penalty phase, that is those witnesses who knew of the petitioner's whereabouts on June 29, 1977, his work associates and service record. . . . There was evidence produced on the petitioner's part that he had no criminal record. . . .

(8) The Court finds no merit to the allegation that Mr. Brackstone rendered the petitioner ineffective assistance during the appellate stage not withstanding [sic] the fact that Mr. Brackstone lost his trial notes.

> (9) The Court finds that Mr. Brackstone did[,] after numerous discussions with the petitioner, conduct an investigation of the petitioner's case. This was done by talking to state witnesses, petitioner's neighbors, visiting the petitioner's home and crime scene, reviewing the State's physical evidence, talking to the co-defendants and the petitioner's co-employees.
>
> (10) The Court finds that Mr. Brackstone has been practicing law since 1937, primarily in a general practice. There was a hiatus between 1956 and 1971 while he was in the mercantile business in Mississippi; that he had made himself aware of legal procedure and legal issues in murder cases.

Based on these findings, the trial court concluded that Brackstone "has met the standard of competence as required by [Tennessee law]: 'Whether the advise [sic] given, or the services rendered by an attorney are within the range of competence demanded by attorneys in criminal cases.' " (Citation omitted.) The appellate court affirmed the trial court's judgment, making no additional findings of significance.

In addressing Groseclose's claim, the district court made extensive findings, which in large measure we will repeat here. We note that none of the district court's findings of primary fact is in any measure inconsistent with the state courts' findings. Instead, the district court simply addressed facts not focused on by the state courts, which focus in turn led the district court to a different legal conclusion. We note that the district court's findings, in addition to being wholly consistent with the state courts' findings, are amply supported by the record.

Indeed, the State does not argue that the findings in question are clearly erroneous. The district court found, as follows:

Brackstone graduated from law school in 1937, and practiced in Mississippi until 1941; after World War II, he worked for the Veterans Administration until 1950; between 1950 and 1956, he operated a business while practicing law part-time; between 1956 and 1971, he did not practice law at all while he operated another business; and between 1971, when he again began practicing law, and Groseclose's trial in 1977, Brackstone had four to six criminal jury trials, none of which was a murder trial. Indeed, before Groseclose's case, Brackstone had never had a murder case that went to a jury. And between his return to practice in 1971 and Groseclose's trial in 1977, Brackstone attended a total of three or four legal seminars, only one part of one of which dealt with defending murder cases.

Brackstone "never said and never reported [to Groseclose] what he investigated or what his results were" during pretrial investigation, and told "Groseclose that he should just plead guilty and throw himself on the mercy of the court." Brackstone never described to Groseclose the nature of the State's evidence against him. Brackstone almost entirely failed to investigate the case; he never, for example, interviewed the crime-incident witnesses or any family members.

Brackstone failed to develop a defense theory. When questioned at the state post-conviction hearing regarding his theory of the case, Brackstone's only response was, "My theory was to do the best I could with what I had."

He explained that "attacking the story of Rickman and Britt was not part of his theory of defense." Thus, he testified, he did not consider mounting "a defense of blaming co-defendants Rickman and Britt who for reasons known only to them had decided to implicate Mr. Groseclose into the murder conspiracy by fabricating his involvement." During the guilt phase of the trial, Brackstone failed to call a single witness or put on any proof, and, further, advised Groseclose not to testify, despite his lack of a criminal record and despite the fact that he had consistently maintained his innocence. Brackstone made one independent objection in the course of the 2400-page transcript. He cross-examined fewer than half of the State's 39 witnesses; his cross-examination of Mount, perhaps the most crucial witness for the State, consisted of a total of 11 pages of transcript. And after failing to present the jury with any evidence on his client's behalf, Brackstone culminated his performance by waiving his closing argument.

When asked during the federal evidentiary hearing whether he thought Brackstone was "effective" or "competent," the attorney for codefendant Britt – who testified for the *State* as an expert witness – responded, "[N]o[,] he was not effective." According to Britt's attorney, "Brackstone was more or less doing what [Rickman's attorney] did to represent his client. He was kind of following [Rickman's attorney's] lead." And as Groseclose's expert witness pointed out, this course was especially ill-judged because "there was no reasonable possibility of a unified defense," given the disparity, indeed hostility, between the parties' interests.

According to Britt's attorney, Brackstone failed to prepare at all for the presentation of mitigation evidence during the sentencing stage of the proceedings. Indeed, Brackstone called only four mitigation witnesses. Moreover, he waived his opening statement – a decision that Groseclose's expert witness in this *habeas* proceeding termed "remarkable." He failed to introduce Groseclose's fairly impressive military record, and failed to present witnesses concerning Groseclose's extensive religious and volunteer activities, despite Groseclose's suggestions and despite the witnesses' ready availability. He failed to call any experts who could have testified about sociological and psychological factors. And while he did opt to make a closing argument during this stage of the proceedings, it occupied all of nine minutes.

Based on these findings, the district court concluded that Brackstone's performance was deficient in many respects, and that the "deficiencies prejudiced the defense so as to deprive the defendant of a fair trial." The court concluded, alternatively, that Brackstone's performance was so deficient – in that it failed to subject the prosecution's case to meaningful adversarial testing – that it was unnecessary to demonstrate prejudice.

2.

With any ineffective-assistance claim, the obvious starting point is *Strickland*, in which the Court "consider[ed] the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective."

466 U.S. at 671. Never before *Strickland* had the Court "directly and fully addressed a claim of 'actual ineffectiveness' of counsel's assistance in a case going to trial." *Id.* at 683. Nonetheless, the Court's recognition "that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial," may be observed "[i]n a long line of cases" dating as far back as 1932. *Id.* at 684. As the Court explained,

> a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

Id. at 685.

A defendant may be deprived of his right to effective assistance of counsel when his attorney has "simply . . . fail[ed] to render 'adequate legal assistance.' " *Id.* at 686. According to the *Strickland* Court, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* This standard is equally "appli[cable] to a capital sentencing proceeding," as it "is sufficiently like a trial in its adversarial format and in the existence of standards for decision, that counsel's role in the proceeding is comparable to counsel's role at trial." *Id.* at 686-87 (citations omitted).

The *Strickland* Court established a two-part test:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. The first prong of this test – the showing of deficient performance – is an objective one: "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness," as judged simply by "prevailing professional norms." *Id.* at 687-88; *accord Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975).

The Court cautioned that in undertaking an ineffective-assistance review, "[j]udicial scrutiny of counsel's performance must be highly deferential," and must avoid the "second-guess[ing of] counsel's assistance . . . , [as] it is all too easy for a court, examining counsel's defense

after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. In order to avoid "the distorting effects of hindsight," a reviewing "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that . . . the challenged action 'might be considered sound trial strategy.' " *Id.* (citation omitted). And in considering whether an action, including a failure to investigate, is a strategic decision, one must consider the effect of information conveyed by the defendant to his counsel.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on

> such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Id. at 690-91.

After these explanations, the Strickland Court turned to a consideration of the second, "prejudice" prong of its test, noting that even professionally unreasonable errors do "not warrant setting aside the judgment of a criminal proceeding if the error[s] had no effect on the judgment." *Id.* at 691. *But see United States v. Cronic*, 466 U.S. 648 (1984). Except in certain limited circumstances, "ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. To do so, the Court explained,

> [i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. . . .
>
> On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. . . .

. . . .

> . . . [T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness. *The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.*

Id. at 693-94 (emphasis added) (citations omitted).

The Court then explained how to apply this general standard to specific circumstances:

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. *When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer* – including an appellate court, to the extent it independently reweighs the evidence – *would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.*

Id. at 695 (emphasis added).

3.

In assessing whether Groseclose was unconstitutionally deprived of the effective assistance of counsel, in the constitutional sense, we turn first to the State's contentions on appeal. The State's challenges to the district court's conclusions, however, are notably sparse. It argues, first, that the district court erroneously ignored the presumption of correctness to be accorded to state-court findings, and essentially performed a *de novo* review of the case. Without pointing to a single factual finding of the state court that was ignored by the district court, the State argues that the underlying findings should have been presumed to be correct, and that if this presumption were applied, it would be clear that Groseclose failed to prove his counsel's performance was prejudicially defective. As we have already observed, however, there is no state-court finding of historical fact that is inconsistent with the district court's findings, and there were no state-court findings that were inappropriately ignored by the district court. And since the ultimate questions of the adequacy of counsel's performance and prejudice to the petitioner are mixed questions of law and fact, not subject to clearly erroneous review, we are constrained to conclude that this part of the State's argument fails.

The State's second argument is a rather unclear procedural-default claim: that, in state court, Groseclose raised "only" ten specific arguments in connection with his ineffective-assistance claim, and that the state court rejected all those claims, "either explicitly or implicitly." The State then argues that Groseclose is now limited to the claims that he raised in state court – yet the State does

not specify which of the arguments Groseclose raised in the district court, or which of the legal bases relied on by the district court, it believes are now barred from consideration. We have no difficulty in concluding that this procedural-default contention is completely lacking in merit. Our review of the record reveals that the arguments that the State acknowledges were preserved in the state court are precisely those that Groseclose relied on in federal court.

4.

Strangely, the State has failed to offer any substantive challenge to the district court's issuance of the writ on the ground of ineffective assistance. Conducting our own *de novo* review, we are satisfied that the district court's action was correct. That is, as we shall explain, we have absolutely no hesitation in concluding that Brackstone's performance was objectively unreasonable and well below the minimum standards of professional competence, and that competent representation may well have garnered a different outcome. Given the record in this case, it is perhaps unsurprising that the State does not present a more vigorous challenge to the district court's conclusion.

This is not to say, however, that Groseclose's arguments are uniformly well-taken. In arguing Brackstone's ineffectiveness, Groseclose mistakenly tends to focus upon perceived shortcomings that may arguably be attributable to trial strategy, such as Brackstone's failure to call certain family members as witnesses during the guilt phase or the failure to file various pretrial motions.

A better advocate may very well have done these things, but that is not the constitutional standard to which an attorney is held under *Strickland*. In addition, some of the arguments Groseclose makes are simply not reliable bases for concluding that Brackstone was ineffective, such as Groseclose's claims that Brackstone did not understand the nature of the trial, and erroneously thought it was a bifurcated proceeding.

Turning now to an assessment of Brackstone's representation of Groseclose in light of the requirements of *Strickland*, we begin first with the so-called *performance* prong of *Strickland*. As the Strickland Court stated, "[t]hat a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." *Strickland*, 466 U.S. at 685. Brackstone was, at best, "a person who happens to be a lawyer." In reaching this conclusion, we find three aspects of Brackstone's representation in this capital case to be especially appalling: (1) his failure to have any defense theory whatsoever; (2) his failure to conduct any meaningful adversarial challenge, as shown by his failure to cross-examine more than half of the prosecution's witnesses, to object to any evidence, to put on any defense witnesses, to make a closing argument, and, at sentencing, to put on any meaningful mitigation evidence; and (3) perhaps most importantly, his abdication of his client's case to Rickman's counsel. Also significant, as noted by the *Strickland* Court, was Brackstone's failure to adequately communicate with Groseclose prior to trial.

While the justification for our conclusion that the first and second failures listed above amounted to an ineffective performance is presumably self-evident, our

third criticism merits a fuller explanation. Certainly, there are cases in which defense counsel for one defendant may defer to counsel for another defendant, allowing that attorney to act as lead counsel. But in this case, Rickman's defense was completely antagonistic to Groseclose's defense. This was a case in which a competent defense attorney would wish for severance. Rickman had confessed and implicated Groseclose. Groseclose, on the other hand, had never made any inculpatory statement to police, and there was little evidence tying him to the crime beyond the statements of his coconspirators. Thus, to align Groseclose's defense with that of Rickman and then to yield the adversarial lead to Rickman's counsel, given the necessary antagonism, is, to use the current vernacular, mind-boggling.

But Brackstone's decision to simply follow the lead of Rickman's court-appointed counsel was an exceptionally egregious decision for Groseclose's fortunes, given the extraordinary tactics employed by that gentleman. First, Rickman's attorney was not a model of preparation. Indeed, he testified during the *habeas* proceeding in the district court that because he believed there was no defense available during the guilt phase of Rickman's trial, he simply failed to prepare for trial. He did not interview any witnesses, conduct any legal research, or obtain and review any records. Second, in what the state court described as a "desperate" strategy, Rickman's attorney decided that his client's best hope was in being portrayed as "subnormal." His defense strategy, therefore, was to attempt "to show the jury that we had a sick boy on trial, a subnormal, abnormal human being on trial. . . . That was my whole object of the whole defense,

was [to] try to convince the jury that we had a sick man on trial." To that end, he had Rickman testify about past violent crimes and drug use, and, in general, repeatedly elicited testimony that portrayed Rickman in a deviant, destructive, and terrifying light. It is difficult to imagine anything more ill-considered than a decision to hitch Groseclose's wagon to that star; there is no conceivable way that the line of defense followed by Rickman's attorney could do anything but further damage Groseclose in ways that a defense tailored to Groseclose would not have done.

We note, too, that there is no conceivable way in which the sum of Brackstone's deficiencies can be ascribed to trial strategy gone awry. As his own testimony in the state post-conviction proceeding made clear, he simply *had* no strategy. Thus, his inaction cannot be characterized as bad judgment stemming from a misguided, but competent, factual or legal investigation. He made no investigation; he made no judgment.

The question then becomes whether it is necessary for Groseclose to demonstrate prejudice, under Strickland's second prong, or whether, as the district court believed, Brackstone's performance was so inept as to amount to a constructive denial of counsel, relieving Groseclose of the need to show prejudice. This is not a dispute we need decide, because the prejudice resulting from Brackstone's lawyering is so patent. We find it quite clear that there were defense tactics available to a reasonably competent attorney that create a reasonable probability that, in the absence of Brackstone's incompetence, the jury would have had a reasonable doubt respecting Groseclose's guilt. The State's evidence tying Groseclose

to the perpetrators of the murder was relatively weak. A defense that capitalized on that weakness, and that marshaled evidence emphasizing it, could certainly have led to a different verdict. Indeed, all that Brackstone need have done to create a much greater probability of a favorable verdict would have been to employ *any* defense, however anemic, that was specifically tailored to Groseclose, rather than a defense that linked Groseclose to Rickman, a man whose lawyer painted him as a vile and dangerous killer.

The prejudice to Groseclose resulting from his lawyer's performance is even easier to discern in the context of the sentencing phase. In addition to having no criminal history, Groseclose was very active in his church, had a positive military record, and had a plethora of family members willing to testify on his behalf. There is a reasonable probability that, absent Brackstone's utter failure to develop or even advert to these mitigating factors, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death sentence.

B.

Given our unambivalent conclusion that Groseclose was denied effective assistance of counsel in a constitutional sense, we find it unnecessary to examine the voluminous remaining assignments of error brought forward by the State in this appeal. Thus, even if we were to agree that the district court erroneously concluded that the State knowingly presented false and misleading testimony and withheld evidence, or unconstitutionally

administered medication to Groseclose during trial, or that the jury instructions were flawed in a variety of ways, that would not change the outcome of this appeal, nor does it matter whether the district court correctly concluded that the cumulative effect of the errors it found resulted in a constitutionally unfair trial. It is, likewise, unnecessary to reach the merits of Groseclose's claims regarding the composition of the jury venire, despite the State's urging that we rectify the district court's decision not to reach that issue. The tenets of judicial economy mandate that we not resolve issues that cannot alter our final decision.

We note in passing, however, the complete lack of merit to Groseclose's position that because various jury instructions were constitutionally defective, the Double Jeopardy Clause prohibits the State from retrying him. The Double Jeopardy Clause is implicated by the issuance of a writ of *habeas corpus* when the basis for the issuance is an insufficiency of the evidence – the failure of the prosecution to prove its case. *See Poland v. Arizona*, 476 U.S. 147, 152-53 (1986). Otherwise, as a general matter, "there is no double jeopardy bar to retrying a defendant who has succeeded in overturning his conviction." *Bullington v. Missouri*, 451 U.S. 430, 442 (1981). " '[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its cases.' " *Id.* (citation omitted). Erroneous instructions plainly fall in the category of trial error. *See Burks v. United States*, 437 U.S. 1, 15 (1978); *see also Saylor v. Cornelius*, 845 F.2d 1401, 1403 (6th Cir. 1988). There is, in short, no bar to retrial.

IV.

Because Groseclose received constitutionally ineffective assistance of counsel, we **AFFIRM** the district court's issuance of a writ of *habeas corpus*.

DISSENT

SUHRHEINRICH, Circuit Judge, dissenting.

During the morning of June 29, 1977, twenty-four year old Deborah Lee Groseclose was raped twice, strangled into unconsciousness, stabbed three or four times in the back, kidnapped from her house, and left locked in the trunk of her automobile which was abandoned in a parking lot in Memphis, Tennessee. Deborah's badly decomposed body was not found until five days later. It was determined that Deborah, who was still alive at the time her automobile was abandoned, had died from heat exposure. By the time Deborah's body was found on July 4, 1977, her eyeballs had been eaten by the maggots which filled her eye sockets.

In 1978, Petitioner William E. Groseclose (Groseclose), Deborah's husband and the father of her infant son Nathan, was convicted of first degree murder for hiring Ronald Eugene Rickman to kill Deborah, and the jury subsequently sentenced Groseclose to die in Tennessee's electric chair. In 1981, the Tennessee Supreme Court affirmed Groseclose's and Rickman's convictions and death sentences, finding the evidence of guilt "overwhelming." *State v. Groseclose*, 615 S.W.2d 142, 146 (Tenn.

1981). Today, more than twenty years after Deborah's horrific murder, the majority in the present case affirms the district court's grant of a writ of *habeas corpus* overturning Groseclose's conviction and death sentence on the grounds that Groseclose was denied his Sixth Amendment right to the effective assistance of counsel. I disagree. A defendant asserting an ineffective assistance claim generally must show not only that defense counsel's performance was deficient but also that this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Even assuming that Attorney Brackstone's representation was deficient, Groseclose has not shown that Brackstone's representation actually prejudiced his defense.[1] In addition, I do not agree with the district court's decision to presume prejudice in this case. For these reasons, I would reject Groseclose's ineffective assistance of counsel argument. I, therefore, respectfully dissent.

I.

A.

As the Supreme Court explained in *United States v. Cronic*, 466 U.S. 648, 665 n. 38 (1984): "We consider in this case only the commands of the Constitution. . . . We address not what is prudent or appropriate, but only

---

[1] In *Strickland v. Washington*, 466 U.S. 668, 697 (1984), the Supreme Court indicated that it was not necessary to address both components of an ineffectiveness inquiry if the defendant makes an insufficient showing on one.

what is constitutionally compelled."[2] In *Cronic*, the Court also stated that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Id.* at 658. Therefore, notwithstanding an attorney's deficient performance, the Sixth Amendment generally is not implicated unless there is some effect on the reliability of the trial. *Id.* A defendant must generally prove the prejudice, if any, which resulted from defense counsel's deficient performance. *Strickland*, 466 U.S. at 692. The defendant must show a reasonable probability that, but for counsel's particular errors, the factfinder would have had a reasonable doubt with respect to the defendant's guilt. *Id.* at 695. Similarly, with respect to a death sentence, the defendant must show that there is a reasonable probability that, absent counsel's errors, the sentencer, including an appellate court to the extent it independently reweighs the evidence, would have concluded that the balance of the aggravating and mitigating circumstances did not warrant the imposition of the death penalty. *Id.* A reasonable probability is one which is sufficient to undermine confidence in the outcome of the proceeding. *Id.* at 694.

In *Strickland*, the Supreme Court discussed in detail the approach a reviewing court should take in conducting this inquiry. The Court stated as follows:

---

[2] The Supreme Court further observed in *United States v. Cronic*, 466 U.S. 648, 665 n. 38 (1984): "It is entirely possible that many courts should exercise their supervisory powers to take greater precautions to ensure that counsel in serious criminal cases is qualified."

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 695-96.

Recently, in *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993), the Court explained that the focus of Strickland's prejudice inquiry is not solely on outcome determination. The Court quoted from *Strickland* where it explained that "a criminal defendant alleging prejudice must show that 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " *Id.* at 369 (quoting *Strickland*, 466 U.S. at 687.). The *Lockhart* Court stated:

> [A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally

> unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him. *See Cronic, supra*, at 658, 80 L Ed 2d 657, 104 S Ct 2039.

Id. at 369-70 (internal footnote omitted). For the reasons discussed below, Groseclose fails both aspects of the prejudice inquiry.

B.

The majority in this case determines that Groseclose has shown that Attorney Brackstone's representation was objectively unreasonable and that Groseclose's defense was prejudiced as a result of this representation. In the majority's view, the prosecution's evidence linking Groseclose to the perpetrators of the murders was "relatively weak." Maj. op. at pp. 1170-1171. The majority opines that a defense which capitalized on this "weakness" and marshaled evidence emphasizing it "could certainly" have produced a different verdict. *Id.* at p. 20. The majority concludes: "all that Brackstone need have done to create a much greater probability of a favorable verdict would have been to employ *any* defense, however anemic, that was specifically tailored to Groseclose. . . . " *Id.*

The majority's analysis is as conclusory as it is unconvincing. In *Strickland*, 466 U.S. at 696, the Supreme Court recognized that some attorney errors will have only an "isolated, trivial effect" on the evidentiary picture. Such is the case here with respect to the alleged errors of Attorney Brackstone. Assuming that Attorney Brackstone's representation was deficient, there is not a

reasonable probability that, but for this allegedly deficient representation, the jury would have had a reasonable doubt with respect to Groseclose's guilt in this case. As the Tennessee Supreme Court noted, the evidence of Groseclose's guilt was "overwhelming." *State v. Groseclose*, 615 S.W.2d at 146. Moreover, despite several post-conviction challenges over the past two decades, Groseclose has never presented any exculpatory evidence. Nor is there even a scintilla of evidence to suggest that Rickman and Britt planned Deborah's murder and then sought to implicate Groseclose after the fact in order to mitigate their own responsibility.[3] Groseclose's ineffective assistance claim must fail. *Cf. Strickland*, 466 U.S. at 696 ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

The following is a summary of some of the overwhelming evidence of Groseclose's guilt introduced by the State at trial almost twenty years ago:

> 1. Barton Wayne Mount, a naval recruit Groseclose met while employed in the Navy Recruiting Service, testified that Groseclose wanted Deborah's murder to look like a "rape-robbery," presumably to divert suspicion from

---

[3] Rickman and Britt gave incriminating statements to the police, which discussed the murder and implicated Groseclose. After a full suppression hearing, both statements, in redacted form, were admitted into evidence and read to the jury. References to the other co-defendants were deleted from the redacted versions of each statement. At the sentencing hearing following trial, Rickman's and Britt's unredacted statements were read in full.

himself. Mount testified that Groseclose was originally willing to pay $50 for Deborah's murder. After Mount informed Groseclose that Britt was unwilling to do it for this amount, Groseclose increased the terms of the deal. Groseclose agreed to pay $200 up front and $500 after the murder, and he would also give Britt a .45 caliber pistol. Mount further testified that, while he was with Groseclose on June 27, 1977, Groseclose withdrew $100 from an automated teller machine at the corner of Hollywood and James Roads in Memphis and borrowed $50 from a friend at the Cracker Barrel convenience store. Mount testified that Groseclose then handed him $150 and instructed him to give the money to Britt. This was two days prior to Deborah's murder. As corroboration, the prosecution offered the testimony of Wayne Robertson of First Tennessee Bank of Memphis and Melville Taylor. Mr. Robertson testified that $100 was withdrawn from Deborah and Bill Groseclose's account at 9:03 p.m. on June 27, 1977, by use of the bank card issued to Bill Groseclose. Mr. Robertson testified that the money was withdrawn from the machine at the Hollywood and James branch of First Tennessee Bank. Mr. Taylor testified that he ran into Groseclose on the evening of June 27, 1977, while leaving the Cracker Barrel Quick Shop Grocery. Mr. Taylor testified that he loaned Groseclose $50 after Groseclose asked for it so that he could pay for a psychiatrist for his wife.

In affirming Groseclose's first degree murder conviction and death sentence, the Tennessee Supreme Court properly described Mount's testimony as "devastating." *State v. Groseclose*, 615 S.W.2d at 145. Although cross-examined by

counsel for all three defendants, Mount's testimony clearly demonstrates that the murder was committed by Rickman and Britt on behalf of, and after being procured by, Groseclose. *Id.*

2. Pam Baker Lindsey, Rickman's former girl friend, testified at trial that Rickman confessed to her that he and Britt had murdered Deborah, and he explained to her how they carried it out. Mrs. Lindsey also described in detail two meetings she attended at a Shoney's restaurant in the days immediately preceding Deborah's murder.[4] Mrs. Lindsey testified that the first meeting was three days before the murder. Groseclose and Rickman talked mainly about Deborah, and Groseclose showed Rickman a picture of her. Mrs. Lindsey attended a second meeting the night before the murder in which Groseclose, Rickman, and Britt were present. Mrs. Lindsey stated that Groseclose, Rickman, and Britt discussed a "job" that Rickman and Britt were to do for Groseclose the following morning. Mrs. Lindsey explained that Groseclose instructed Rickman and Britt to arrive at his house at 6:30 a.m. the next morning and to wait for him in the tool shed in the back of his house. Mrs. Lindsey testified that, after leaving Shoney's, she and Rickman followed Groseclose to an automatic teller machine where he withdrew money and gave it to Mrs. Lindsey who passed it to Rickman.[5] In addition, Mrs.

---

[4] Mrs. Lindsey was not indicted in connection with Deborah's murder.

[5] Mr. Robertson testified that $40 was withdrawn from Deborah and Bill Groseclose's account at 6:36 p.m. on June 28, 1977, by use of the bank card issued to Bill Groseclose. The

Lindsey testified that she drove with Rickman and Britt to Groseclose's house either during the afternoon of the day Deborah was murdered or during the afternoon of the following day. Britt got out of the car and spoke with Groseclose at the house.

3. Deborah's mother, Aline Watts, testified that Groseclose and Deborah were having marital problems at the time of Deborah's murder. Mrs. Watts also testified that she received a telephone call from Groseclose on the morning of the murder. Groseclose informed Mrs. Watts that he had received a call from Deborah's employer after she did not show up for work. Mrs. Watts telephoned the police and then went to Groseclose's house to pick up the couple's infant child. Mrs. Watts testified that, while at the house, she saw Mount and Britt, at separate times, talking to Groseclose.

4. Doyle Scroggins testified that in June 1975 Groseclose purchased an insurance policy on Deborah's life. Groseclose was the beneficiary of the policy, which had a face value on the date of Deborah's murder of approximately $12,000. In addition, James Perkins testified that he sold Groseclose a life insurance policy in late July or August 1975. Groseclose purchased $30,000 of life insurance on himself, as well as a rider[6] on Deborah for $20,000. Groseclose was the first beneficiary on Deborah's portion of the

---

money was withdrawn at the Hollywood and James branch of First Tennessee Bank.

[6] A "rider" is an additional insured person on the named insured's policy.

policy. Mr. Perkins testified that Groseclose contacted his office in May 1977, the month prior to Deborah's murder, and stated that there was an error in his policy. Mr. Perkins testified that Groseclose contended that the entire policy should have been on Deborah's life, and he wanted the policy changed accordingly. Mr. Perkins stated that he convinced Groseclose that it was in his best interests to leave the policy as written. The Tennessee Supreme Court noted that Groseclose's desire to obtain the life insurance proceeds may have been one of the motives for the murder. *State v. Groseclose*, 615 S.W.2d at 144.

5. John Shanks, who was recruited by Groseclose for the Navy, testified that Groseclose had asked him, in November or December of 1976, if he would be interested in killing Groseclose's wife. Michael Blasco, another recruit, testified that Groseclose had asked him, in May or June of 1977, if he knew somebody who would do some "hit work."

Because there is neither a reasonable probability that the outcome of the guilt phase of Groseclose's trial would have been any different but for Attorney Brackstone's alleged errors, nor any basis for concluding that Groseclose's trial was fundamentally unfair or unreliable, no Sixth Amendment violation inheres. *Lockhart*, 506 U.S. at 370; *Scarpa v. Dubois*, 38 F.3d 1, 16 (1st Cir. 1994).[7]

---

[7] Also unconvincing is the testimony of Groseclose's experts. In the district court, Groseclose offered the testimony of William Marett, an attorney who actually represented Groseclose for a time in the 1980's during Groseclose's state post-conviction proceedings. Mr. Marett testified that he

C.

The majority finds the prejudice resulting from Attorney Brackstone's representation at the sentencing stage "even easier to discern." *Id.* The majority opinion states that, in addition to having no criminal record, Groseclose was active in his church, had a positive military record, and a "plethora" of family members who were willing to testify on his behalf. *Id.* The majority concludes that, but for Attorney Brackstone's "utter failure to develop or even advert to these mitigating factors," there is a reasonable probability that the jury would have concluded that the balance of the aggravating and mitigating circumstances in the case did not warrant a death sentence. *Id.* I disagree.

At the outset, I wish to clarify several points with respect to the majority's analysis. First, Groseclose did, in

---

believed that Attorney Brackstone's representation resulted in legal prejudice to Groseclose. With respect to the existence of any possible evidence which would have supported Groseclose's defense, Mr. Marett testified that he never conducted any investigation; however, Mr. Marett opined that there were "a lot of things" which could have been brought out to challenge the statements of the co-defendants and cast doubt on their veracity. In addition, despite rendering an opinion as to prejudice, Mr. Marett conceded on cross-examination that he was "not very familiar" with respect to the facts of the case as to guilt. Groseclose also offered the expert testimony of Charles Fels. Mr. Fels testified that, on the basis of the deficiencies he perceived in Attorney Brackstone's performance, Brackstone was, in fact, an "ally of the prosecution" and this was "inherently prejudicial." This analysis seems more like a finding of prejudice per se than a finding of any actual prejudice resulting from Attorney Brackstone's representation. I shall address this issue in section II.

fact, testify on direct examination during the sentencing stage that he had never previously been arrested or indicted for a crime. The prosecution did not rebut this on cross-examination. Second, although his actual military records were not introduced, Groseclose nonetheless testified that he had been assigned to a destroyer during the Vietnam conflict, had been in combat, and had received a few wounds. Groseclose testified that he had been awarded, among other things, the Vietnamese Service Medal with three bronze stars and the Good Conduct Medal. On cross-examination, the prosecution did not question this aspect of Groseclose's testimony either. Third, I am unconvinced that Groseclose was *active* in his church. Gladys Adams, the general overseer of the Church of God in Memphis, Tennessee, testified in the district court that she knew Groseclose who was her son's neighbor. Mrs. Adams testified that, after Groseclose's arrest, she visited with him weekly in the Shelby County jail, and, in her view, Groseclose was "sincere about his commitment to Christ." Following his conviction and death sentence, Groseclose became an ordained minister of the Church of God. Mrs. Adams testified that the Church licensed Groseclose "in desperation to get religious services in the Death Row." However, when asked what church Groseclose had attended prior to his arrest, Mrs. Adams could only testify: "He was a Methodist, and I think that he did attend." The district court testimony of Mrs. Watts, Groseclose's mother-in-law, is also instructive. Mrs. Watts was asked on direct examination if she was aware of any religious activity on the part of Groseclose before his arrest. Mrs. Watts succinctly responded: "I have never known him to go to church." It

appears that Groseclose's religious conversion did not occur until after his conviction and death sentence for his wife's contract murder.

There are several reasons why I reject the majority's decision to find prejudice at the sentencing stage. First, as the facts plainly demonstrate, Deborah's murder was absolutely horrific, "one of the most brutal and atrocious imaginable." *State v. Groseclose*, 615 S.W.2d at 145. Second, Groseclose was the master mind behind this murder. Third, Deborah was Groseclose's wife and the mother of his infant child. Fourth, in the event additional mitigating character evidence had been introduced, the prosecution would have responded in kind. In the district court, Hugh Stanton, former District Attorney General for Shelby County, testified that the prosecution would have attacked Groseclose's character by recalling Mrs. Watts to testify as to how Groseclose "whipped on" Deborah while she was pregnant. Fifth, unlike the district court below, I would place no reliance on the fact that Britt was only sentenced to life in prison as opposed to the death penalty. Indeed, as the Tennessee Supreme Court noted, there were compelling differences between Britt and his co-defendants. Some of these included: (1) Britt was only nineteen years old at the time of the murder; (2) there was substantial evidence in the record that Britt was subject to domination and influence by the older Rickman; and (3) unlike his co-defendants, Britt manifested regret and remorse over the incident. *Id.* at 149. Britt did not formulate the plan to kill Deborah, nor was he the victim's husband and the father of her baby.

The legal standard articulated in *Strickland* is "highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382

(1986). The defendant must demonstrate that a reasonable probability exists that, but for defense counsel's errors, the sentencer, including an appellate court to the extent it independently reweighs the evidence, would have concluded that the balance of the aggravating and mitigating circumstances in the case did not warrant the imposition of the death penalty. *Strickland*, 466 U.S. at 695. A reasonable probability, the Supreme Court explained, is one which is sufficient to undermine confidence in the outcome. *Id.* The jury at Groseclose's trial found two aggravating circumstances: (1) Groseclose employed another to commit the murder for remuneration; and (2) the murder was especially heinous in that it involved depravity of mind. I conclude that there is not a reasonable probability that either the jury or the Tennessee Supreme Court would have concluded that Groseclose did not deserve the death penalty for Deborah's murder. In my view, the balance of the aggravating and mitigating circumstances still would have warranted the death penalty in the case of this horrific contract murder. Because there is not a reasonable probability that the outcome of the sentencing stage of Groseclose's trial would have been any different but for Attorney Brackstone's allegedly deficient representation, nor any basis for concluding that Groseclose's death sentence was fundamentally unfair or unreliable, I would reject Groseclose's ineffective assistance challenge to the sentencing stage as well. *Lockhart*, 506 U.S. at 370.

II.

The majority finds that the prejudice resulting from Attorney Brackstone's representation is "so patent" that

the majority need not consider the apparently more difficult question of whether Attorney Brackstone's representation was "so inept as to amount to a constructive denial of counsel, relieving Groseclose of the need to show prejudice." Maj. op. at p. 19. Unlike the majority, the district court below reached this question and concluded that there was prejudice per se. The district court found that Attorney Brackstone failed to remain an "active advocate" who observed a duty of "zealous and loyal representation" of his client. *Groseclose v. Bell*, 895 F. Supp. at 960. The district court determined that Attorney Brackstone deprived Groseclose of a fair trial because Brackstone failed to subject the prosecution's case to meaningful adversarial testing and failed to function in any meaningful sense as the Government's adversary. *Id.* The court relied, in large part, upon dicta contained in the Supreme Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984), as well as upon the Tenth Circuit's decision in *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988). The court also cited to the Ninth Circuit's decision in *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991). Since I would reject Groseclose's actual prejudice argument, I must consider the district court's decision to find prejudice per se.

A.

In *Cronic*, the Supreme Court explained in dicta that certain circumstances are so likely to prejudice the accused that the cost of litigating their effect on a particular case is unjustified:

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.[25] Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.
>
> ---
>
> [25] The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.

Cronic, 466 U.S. at 658-59 & n. 25. The Court cautioned, however, that apart from circumstances of this magnitude, there generally exists no basis for finding a Sixth Amendment violation unless the defendant can show that counsel's specific errors undermined the reliability of the finding of guilt. *Id.* at 659 n. 26.

In my dissenting opinion in the companion case of *Rickman v. Bell*, I set forth at length my understanding of the *Cronic* dicta. I reviewed our circuit's narrow applications of the *Cronic* dicta, and I noted my disagreement with the more expansive interpretations of *Cronic* by the Ninth and Tenth Circuits in *Swanson* and *Osborn*, respectively. I also explained how these expansive interpretations of the *Cronic* dicta frustrated a principal policy underlying the prejudice per se exception; i.e., the desire

to avoid the cost of case-by-case litigation over the existence of actual prejudice. I need not repeat this analysis here.

Nor need I recount here the particular elements of Attorney Brackstone's representation which, in the district court's view, warranted the application of the *Cronic* dicta. *See Groseclose v. Bell*, 895 F. Supp. at 958-60. Suffice it to say, there is no reason why the errors in Attorney Brackstone's representation, as found by the district court, are not amenable to the traditional *Strickland* analysis and its requirement of actual prejudice. *See Scarpa v. Dubois*, 38 F.3d 1, 12-13 (1st Cir. 1994); *Rickman v. Bell*, (Suhrheinrich, J., dissenting). As the Fifth Circuit explained in *McInerney v. Puckett*, 919 F.2d 350, 353 (5th Cir. 1990): "bad lawyering, regardless of how bad, does not support the [per se] presumption; more is required." Indeed, Groseclose himself does not argue on brief that we should find prejudice per se. Groseclose contends only that he has shown actual prejudice resulting from Attorney Brackstone's representation in this case. *See* Appellee's Br. at p. 41.

B.

The instant case is unlike either of the two examples of constructive denial of counsel discussed in *Cronic*. *See Woodard v. Collins*, 898 F.2d 1027, 1028-29 (5th Cir. 1990); *Rickman v. Bell*, (Suhrheinrich, J., dissenting). First, the Supreme Court has consistently found constitutional error without any showing of prejudice where counsel was totally absent or prevented from assisting the defendant during a critical stage of the proceeding. *Cronic*, 466

U.S. at 659 n. 25. Neither situation occurred here. Second, Attorney Brackstone did not *entirely* fail to subject the prosecution's case to meaningful adversarial testing. *Id.* at 659.

At Groseclose's state post-conviction relief hearing in 1982, Attorney Brackstone[8] testified that he asked Groseclose during their initial meetings for information that would assist Brackstone in preparing a defense. Attorney Brackstone testified that Groseclose stated that "he didn't do it" and Brackstone responded "I'll need more than that." Attorney Brackstone testified that he asked Groseclose about his neighbors, and Groseclose provided Brackstone with the names of several. Attorney Brackstone testified that he met with the neighbors Groseclose had mentioned, as well as with other neighbors that Brackstone had found, in order to determine if any could be of assistance to Groseclose.

Attorney Brackstone further testified that he spoke with the State's investigators, the attorney general, and counsel for the other co-defendants. Attorney Brackstone testified that the State allowed him to review the physical evidence it had in the case, and counsel for the co-defendants provided him with information as to their clients' confessions, which Brackstone subsequently had the opportunity to read. Attorney Brackstone testified that he later interviewed Rickman and Britt in order to verify their statements.[9]

---

[8] Attorney Brackstone died in 1994.

[9] The majority opinion states that "none of the district court's findings of primary fact is in any measure inconsistent

Attorney Brackstone testified that he informed Groseclose that he had reviewed the State's evidence in the case. Attorney Brackstone testified that he told Groseclose "some of the things that I saw," and he advised Groseclose that Groseclose would probably be convicted if the case proceeded to trial "with the evidence that they had." Moreover, Attorney Brackstone testified that he recommended the possibility of a plea bargain to Groseclose whose response was simply: "no way."[10]

---

with the state courts' findings." Maj. op. at p. 10. This statement is incorrect. The district court found that Attorney Brackstone "failed to investigate any of the circumstances of the case." *Groseclose v. Bell*, 895 F. Supp. 935, 955 (M.D.Tenn. 1995). However, as the majority opinion itself notes, the state trial court had previously concluded, in rejecting Groseclose's petition for post-conviction relief, that Attorney Brackstone " 'did [,] after numerous discussions with the petitioner, conduct an investigation of the petitioner's case.' " Maj. op. at p. 9 (quoting the Tennessee state court's findings). The state trial court's opinion also discussed the elements of this investigation. *See id.*

[10] Notwithstanding this testimony, the district court concluded that "Mr. Brackstone failed to form any kind of working relationship with his client" and failed to report to Groseclose "what, if anything, he investigated or what his results were." *Groseclose v. Bell*, 895 F. Supp. at 955. As support for its conclusions, the district court apparently relied upon the testimony of Groseclose at his state post-conviction relief hearing in 1982. *See id.* Two points must be made. First, Groseclose's testimony is not an acceptable basis for concluding that Attorney Brackstone did not conduct an investigation with respect to the case, because Groseclose was in custody at that time awaiting trial for the contract murder of his wife and could not possibly have known what Attorney Brackstone was doing. Second, with respect to the district court's conclusions as to what Attorney Brackstone actually told Groseclose, the district

Attorney Brackstone testified that, after Groseclose rejected the possibility of a plea bargain, Brackstone conducted legal research and had discussions with several attorneys who had previously handled death penalty cases in which the guilt and penalty stages of the trial were bifurcated. In addition, Attorney Brackstone filed a Motion of Defendant for State to Produce Statements and Material, which requested, among other things, the names of prosecution witnesses and any evidence that would tend to exculpate Groseclose. The trial court granted this motion. Attorney Brackstone also filed a Motion of Defendant for Psychological Evaluation in order to determine if Groseclose was competent to stand trial. The trial court ordered an evaluation, and the examining physician determined that Groseclose was, in fact, competent.

As the majority notes, Attorney Brackstone agreed to allow Robert Livingston, Rickman's attorney, to act as lead counsel at trial. Attorney Brackstone also testified that his theory at trial "was to do the best I could with what I had." Attorney Brackstone noted that the other defendants had given confessions, while Groseclose had not. Attorney Brackstone also pointed out that defendant Mount had received a separate trial, and the prosecution

---

court apparently made a credibility determination and found Groseclose's self-serving, uncorroborated, death row testimony more credible than Attorney Brackstone's. While I acknowledge that our review of factual findings is deferential, *see* Fed. R. Civ. P. 52(a), the basis for the district court's conclusions is nevertheless highly suspect. In any event, these findings do not affect my ultimate determination that we should not presume prejudice in this case.

had actually used him as a witness in the case. Attorney Brackstone testified that he tried to bring to the jury the possibility "that it could have been some of the codefendants telling a different version of it than he[Groseclose] told." In addition, Attorney Brackstone, like the attorneys for the other two co-defendants, did not put on a defense after the prosecution had presented its case. Thomas Pera, a trial attorney for defendant Britt, testified in the district court and explained that this allowed the defense to "cut away the State's rebuttal." Mr. Pera stated: "Generally around those courts the way the prosecutors do it is they have the opening final argument and then they lay out the case about the guilt and everything and usually rebuttal is when you come back and start talking about the bad things . . . the defense doesn't want to hear." While Attorney Brackstone's decision to allow Attorney Livingston to act as lead counsel, his theory at trial, and his strategic decision not to put on a defense may have been deficient, there is still no reason why these errors are not amenable to the traditional *Strickland* prejudice analysis. *See Scarpa*, 38 F.3d at 12-13.

Finally, with respect to the sentencing stage of the trial, Attorney Brackstone called five witnesses. These included Groseclose, one of his neighbors, and three employees from the Navy Recruiting Service where Groseclose had worked. Attorney Brackstone testified that another neighbor, who was allegedly a "good friend" of Groseclose's, "emphatically" refused to testify, and Groseclose's mother had been sick and did not think she could make the trip to testify. In addition, Attorney Brackstone testified that two of the mitigation witnesses

offered testimony that was different than what Brackstone had expected following his interviews with the witnesses. Attorney Brackstone testified that he thought Groseclose's neighbor would be outspoken and attempt to assist Groseclose. Attorney Brackstone also testified that Chief John Purcell from the Navy recruiting station "didn't speak so highly" of Groseclose. Attorney Brackstone stated that "he[Chief Purcell] was the one I was told to look up. . . . Mr. Groseclose gave me his name." The majority and the district court have found that Attorney Brackstone could have presented additional mitigating evidence. Again, assuming that Attorney Brackstone's representation was deficient in this respect, this error should be subject to the *Strickland* analysis; it is not a basis for finding prejudice per se.

III.

In my dissenting opinion in *Rickman v. Bell*, I explained that, although I did not condone Attorney Livingston's representation in that case, it nevertheless satisfied the minimum standard demanded by the Constitution. Similarly, in the present case, I do not necessarily approve of the representation provided by Attorney Brackstone. I have concluded, however, that Attorney Brackstone's representation comported with the minimum requirements of the Constitution, and that is the end of my inquiry. As the Supreme Court declared in *Cronic*, 466 U.S. at 665 n. 38: "We address not what is prudent or appropriate, but only what is constitutionally compelled."

Groseclose is unable to show actual prejudice resulting from his attorney's representation, and his case does not fall within the narrow exception to this requirement discussed in dicta in Cronic. Therefore, I would reject Groseclose's ineffective assistance of counsel claim. The majority's holding to the contrary grants "the defendant a windfall to which the law does not entitle him." *Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993). From that holding, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

WILLIAM E. GROSECLOSE	)	
	)	
v.	)	No. 3:89-0662
	)	
RICKY BELL, Warden	)	

MEMORANDUM

In this habeas corpus proceeding under 28 U.S.C. § 2254, Petitioner William Edward Groseclose challenges the constitutionality of his 1978 conviction and sentence of death by electrocution imposed by the Criminal Court of Shelby County, Tennessee. Mr. Groseclose was tried and convicted in February of 1978 for murder in the first degree for the murder of his wife, Deborah Lee Groseclose. Commencing at 10:00 a.m. on April 10, 1995, the Court conducted an evidentiary hearing on Mr. Groseclose's claims challenging the constitutionality of his conviction for first-degree murder. Based upon the evidence in the record, the Court makes the following findings of fact and conclusions of law, in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

I. FINDINGS OF FACT

A. Procedural History

1. In late February of 1978, Petitioner Groseclose was tried and convicted for murder in the first degree for

the death of his wife.[1] After Groseclose was convicted and sentenced to death he appealed to the Tennessee Supreme Court, the court affirmed Groseclose's conviction and sentence on February 17, 1981. *State v. Groseclose & Rickman*, 615 S.W.2d 142, 150 (Tenn. 1981). On February 27, 1981, the Tennessee Supreme Court denied a petition for rehearing. *Id.* at 142. Mr. Groseclose then filed a petition for certiorari to the United States Supreme Court which was denied on October 5, 1981. *Groseclose v. Tennessee*, 454 U.S. 882, 102 S. Ct. 306, 70 L. Ed. 2d 193 (1981).

2. Petitioner Groseclose filed his first petition for post-conviction relief in the Criminal Court of Shelby County, Tennessee in January of 1982. The trial court conducted an evidentiary hearing on March 25-26, 1982, and denied his petition on December 5, 1982. Petitioner sought an appeal, and on February 16, 1984, the Court of Criminal Appeals affirmed the judgment of the trial court. Groseclose then filed a petition for rehearing. On

---

[1] William Groseclose was convicted of hiring Ronald Eugene Rickman to kill his wife, Deborah Groseclose. The victim, a twenty-four old Memphis medical receptionist, was raped twice, strangled into unconsciousness, stabbed three or four times in the back, kidnapped from her home, and left locked in the trunk of her automobile parked at the downtown Memphis library in the broiling sun from about 9:00 a.m. on June 29, 1977 until her badly decomposed body was discovered some five days later during the early afternoon of July 4, 1977. She died from heat exposure. Both Rickman and Groseclose received the death penalty. Phillip Michael Britt was convicted of helping Rickman commit the crime and was given a life sentence. Barton Wayne Mount was sentenced to ten years, and served four, for being a go-between between Groseclose and Rickman. By Order entered on September 2, 1994, this Court vacated Rickman's conviction for first-degree murder.

July 2, 1984, the Tennessee Supreme Court denied Petitioner's application for permission to appeal. On November 26, 1984, the United States Supreme Court denied Groseclose's petition for the writ of certiorari. *Groseclose v. Tennessee*, 469 U.S. 1066, 105 S. Ct. 549, 83 L. Ed. 2d 436 (1984).

3. On March 31, 1986, Petitioner filed his second petition for post-conviction relief. On May 23, 1986, the trial court granted the State's motion to dismiss the petition. On February 25, 1987, the Court of Criminal Appeals entered an opinion affirming the dismissal of the petition without an evidentiary hearing. The Tennessee Supreme Court subsequently denied Petitioner's application for permission to appeal that judgment.

4. In June 1989, Petitioner filed his third petition for post-conviction relief, which the trial court dismissed. On March 6, 1991, the Court of Criminal Appeals entered an opinion affirming the dismissal of the petition. On September 9, 1991, the Supreme Court of Tennessee denied Petitioner's application for permission to appeal that judgment.

5. In September 1992, Petitioner filed a petition for a state writ of habeas corpus. On January 24, 1994, the Criminal Court of Tennessee, Thirteenth Judicial District, denied the petition.

6. Petitioner filed the instant petition for writ of habeas corpus on August 15, 1989, under 28 U.S.C. § 2254, challenging the legality of his confinement and death sentence. (Pet. Habeas Corpus, Doc. No. 2.) Petitioner's execution was scheduled for August 23, 1989. By Order entered on August 23, 1989, this Court granted a

stay of execution of Groseclose's death sentence. (Ord., Doc. No. 8.)

7. Respondent filed two motions for judgment on the pleadings with respect to procedural default issues. By Order entered November 8, 1994, the Court denied respondent's motions for judgment on the pleadings. (Ord., Doc. No. 128.)

8. On January 13, 1995, Petitioner filed a motion for summary judgment as to several of his claims. By Order entered April 5, 1995, the Court granted in part, denied in part, and dismissed in part Petitioner's motion for summary judgment. (Ord., Doc. No. 184.) However, the Court, at that time, reserved judgment as to issuing a writ of habeas corpus because Petitioner had other claims to be heard at an evidentiary hearing.

9. On April 10, 1995, the Court conducted an evidentiary hearing on the remainder of Petitioner's claims. Petitioner challenges the constitutionality of his conviction for first-degree murder on the basis of the following claims:

(1) Trial attorney Fernand Brackstone rendered inadequate and ineffective assistance of counsel to the prejudice of Petitioner Groseclose, in violation of the Sixth, Eighth, and Fourteenth Amendments;

(2) Violation of due process because grand jury foreman which indicted Petitioner did not represent a cross-section of the community in that blacks and women were systematically underrepresented, which constitutes a violation of the Fifth, Sixth, and Fourteenth Amendments.

(3) Totality of errors and cumulative effect of those errors at Petitioner's trial merit granting habeas relief.

10. Petitioner has not raised, and has therefore waived, the following claims alleged in his habeas corpus petition to challenge the constitutionality of his conviction:

(1) Prejudicial admission of photographs of decomposed body.

(2) Violation of Petitioner's right to confront and cross-examine co-defendant Britt.

(3) Right to fair trial violated because of outside influence and information on jurors.

(4) Unconstitutional jury instructions concerning mitigating circumstances.

B. Facts Relevant To Claims[2]

(1) Ineffective Assistance of Counsel

1. This was a case of a murder indictment against four defendants that resulted in the conviction of three and the severance of co-defendant Mount. All the other

---

[2] Citations to the record are made as follows:

Doc. No. __	Federal Court Document Docket Number
PC Tr. __	State Post-Conviction Transcript, Page
PC Exh. __	State Post-Conviction Exhibit, Page
EH Tr. __	Federal Evidentiary Hearing Transcript, Page
EH Exh. __	Federal Evidentiary Hearing Exhibit, Number
St.Ct.Tr. __	State Trial Transcript, Page
St.Ct.Exh. __	State Trial Exhibit, Page
Closing Arg. Tr. __	State Trial Closing Argument, Page

defendants gave statements implicating Petitioner Groseclose. Mr. Groseclose made no statement except to protest his innocence and consistently advised his trial attorney that he was innocent and did not do it. (PC Tr. 255). Mr. Groseclose was willing to testify at the guilt phase of his trial as to his innocence. (PC Tr. 256-257). Based upon his trial attorney's advice, Mr. Groseclose did not testify at the guilt phase. (PC Tr. 259-260).

2. The trial attorney that represented Mr. Groseclose was Fernand D. Brackstone who was employed by Mr. Groseclose's mother. (PC Tr. at 199-200). Attorney Brackstone paid one-third of his fee in the matter to attorney Pickens, who had referred Groseclose's mother to him. (PC Tr. 409). Trial attorney Brackstone first met Mr. Groseclose in the Shelby County jail some time after his arrest. (PC Tr. 199-200). At that first meeting, attorney Brackstone told Mr. Groseclose that he was going to investigate the case. (PC Tr. 200). The next time attorney Brackstone and subsequent times that attorney Brackstone saw Mr. Groseclose he never said and never reported what he investigated or what his results were. (PC Tr. 200-201). Attorney Brackstone frequently told Mr. Groseclose that he should just plead guilty and throw himself on the mercy of the court. (PC Tr. 201-202).

3. Petitioner Groseclose spent a total of twelve years in the United States Navy. (PC Tr. 197). He had an excellent disciplinary record in the Navy except for a Captain's mast for a rule violation which was a non-judicial proceeding resulting in an oral reprimand. (PC Tr. 198) (EH Exh. 20). His family lives in Tennessee and Virginia and he is very close to them. (PC Tr. 197). Mr. Groseclose

had no prior criminal record before this charge. (PC Tr. 198).

4. Attorney Brackstone never asked Mr. Groseclose about defenses he might have to the charges against him. (PC Tr. 203). When Mr. Groseclose had suggestions about a defense, attorney Brackstone always had some reason why it should not be raised. (PC Tr. 203, 204). Mr. Groseclose specifically asked that members of his family be called to testify, but attorney Brackstone didn't think that was a wise idea. (PC Tr. 203). Attorney Brackstone admitted that he never saw family members and couldn't answer whether they were available or not. (PC Tr. 389).

5. Three experts testified at the evidentiary hearing about whether attorney Brackstone met the Sixth and Fourteenth Amendment requirements concerning effective assistance of counsel. Petitioner Groseclose called attorney William J. Marett and attorney Charles W. Fels and counsel for Groseclose cross-examined attorney Thomas Pera, a witness for the respondent, on this issue. Attorney Pera, who represented the co-defendant Britt in the Groseclose trial, was asked whether attorney Brackstone was reasonably effective in representing Mr. Groseclose at trial and answered, "No, he was not effective." (EH Tr. 289). Mr. Pera elaborated his answer by noting that he would have done things that attorney Brackstone did not do, primarily in putting together something to mitigate in case his client was convicted. (EH Tr. 289). In fact, attorney Pera, who had organized and investigated the mitigation evidence for co-defendant Britt who received life imprisonment, testified that attorney Brackstone could have done the exact same thing he did in terms of investigation and preparing for

the mitigation stage. (EH Tr. 290). Attorney Pera prepared for mitigation by contacting local experts at Memphis State University to testify. (EH Tr. 290). Attorney Brackstone failed to so prepare and never even asked attorney Pera where he found his expert witnesses. (EH Tr. 291). Attorney Pera could not recall attorney Brackstone in their defense lawyer conferences at trial ever saying anything to the effect that he was working on mitigation evidence, or had a plan for mitigation evidence, or had a strategy for mitigation evidence. (EH Tr. 291). In fact, attorney Pera laughed in surprise when asked if he would have been shocked to have heard something like that from attorney Brackstone. (EH Tr. 291). Attorney Pera confirmed that that was not the kind of performance attorney Brackstone put on during the trial. (EH Tr. 292).

6. Attorney Pera also confirmed, as attorney Brackstone admitted at the post-conviction hearing, that Mr. Brackstone was more or less doing what Mr. Livingston did to represent his client and that he was kind of following Mr. Livingston's lead. (EH Tr. 292). Attorney Pera in fact did not remember Brackstone doing anything really other than what Mr. Livingston did. (EH Tr. 307). Attorney Pera agreed that for this kind of death penalty case in 1978 it was necessary in order to be effective in such cases to have a seasoned trial attorney. (EH Tr. 293).

7. Attorney Brackstone was not a seasoned trial attorney. Attorney Brackstone graduated from law school in 1937 but was not admitted to practice in Tennessee until 1971. (PC Tr. 346). He originally practiced law in Mississippi from 1937 to 1941, was then in the military service, and after World War II went to work for the Veterans Administration handling claims filed against the

government until about 1950. Attorney Brackstone then bought his uncle's general merchandise business in Corinth, Mississippi and operated that business until 1956 and then became associated with a "manufacturing outfit" from Falls River, Massachusetts. (PC Tr. 346-349). From 1956 until 1971 Mr. Brackstone did not practice law. (PC Tr. 349-350). From 1971 through the time of Mr. Groseclose's arrest in 1977, attorney Brackstone had four to six criminal cases that actually went to trial by jury. (PC Tr. 351) The Groseclose case was attorney Brackstone's first murder trial in Tennessee. (PC Tr. 352). Before the Groseclose case attorney Brackstone never had a murder case that went to a jury, in any state where he had practiced. (PC Tr. 352). At the post-conviction hearing in 1982, attorney Brackstone was even unclear as to how he came to practice in Tennessee. At first he said he took the Tennessee bar exam in 1970 or 1971. (PC Tr. 352). Then he changed his mind and said that he did not take the examination but was admitted to practice based on reciprocity. (PC Tr. 352-353). Between 1971 and 1977 attorney Brackstone attended only three or four CLE seminars, and only part of one of those seminars dealt with the defense of murder cases. (PC Tr. 353). Attorney Brackstone from 1971 to 1977 was not affiliated with any professional legal organizations of criminal defense attorneys and did not take any periodicals that made special reference to criminal defense work. (PC Tr. 354).

8. For expert testimony in the evidentiary hearing, Petitioner Groseclose called expert Charles W. Fels, an attorney from Knoxville, Tennessee who has practiced almost exclusively in the defense of criminal cases for the past ten years. Prior to that time Mr. Fels served eight

years as a prosecutor as an Assistant U.S. Attorney and Assistant District Attorney in Knox County, Tennessee. Mr. Fels has been a visiting lecturer for the Federal Bureau of Investigation (FBI) at Quantico for over three years and has been an instructor at the National Criminal Defense College for over seven years. As a defense attorney, Mr. Fels testified he had been involved in both the prosecution and defense of several death penalty cases. (EH Tr. 209-212). Mr. Fels has testified as an expert witness for both the prosecution and the defense in the past. (EH Tr. 212-213).

9. Attorney Charles Fels outlined the steps he considered "normal" in defending a death penalty matter: (1) to form a meaningful and close working relationship with the client; (2) to interview the client carefully and independently investigate all circumstances of the case; (3) to communicate to the client all evidence against him; (4) to determine statutory and non-statutory mitigating circumstances and to prepare witnesses properly before they testify; (5) to file meaningful pre-trial motions; and (6) to object throughout the proceeding in an effort to protect the record against procedural default or waiver. Mr. Fels reviewed the 2,400 page transcript of Petitioner Groseclose's trial (EH Tr. 213), and concluded that in all of these critical areas, trial attorney Brackstone's legal representation was constitutionally deficient. (EH Tr. 215-216).

10. According to Fels, Brackstone failed to perform as a reasonably effective attorney in almost every area. (EH Tr. 216). He only filed five pre-trial motions is [sic] a case where "normally effective counsel" would filed [sic] "35 to 50" pre-trial motions. (EH Tr. 216). Fels further

stated that effective counsel should raise all matters that he or she legitimately can pre-trial. (EH Tr. 238). Of the five pre-trial motions filed, none related to matters of substance and did not challenge the then-new death penalty statute in Tennessee. (EH Tr. 216). There was no *Brady* motion filed. (EH Tr. 216). As attorney William Marett pointed out, the Tennessee death penalty statue was new in the Groseclose case and there would have been many questions about the statute that should have resulted in pre-trial motions. (EH Tr. 101). Attorney Marett also noted that a reasonably effective trial lawyer in Tennessee in 1978 would have filed a motion relating to the composition of the grand jury. (EH Tr. 101).

11. According to Fels, of the 2,400 pages of actual trial testimony, Brackstone made only one independent trial objection. (EH Tr. 218). Attorney Charles Fels stated that he would anticipate in death penalty case of this magnitude that a reasonably effective attorney would have hundreds of grounds for new trial in an effort to protect the record. (EH Tr. 219). Instead, attorney Brackstone filed a motion for new trial which consisted of a mere three grounds. (EH Tr. 219). He then dropped the third ground concerning newly discovered evidence. (EH Tr. 219-220).

12. According to Fels, attorney Brackstone also failed to seek a severance to avoid a sentencing hearing where all the co-defendants would be in conflict and where everyone testifies in ways that are adverse to the interests of others. (EH Tr. 217).

13. Attorney Charles Fels also testified that there was no reasonable possibility of a unified defense or

simply following the lead of attorney Livingston in this case because attorney Brackstone's overriding mission should have been to perfect the interests of his own client. (EH Tr. 217-218). By looking to attorney Livingston, attorney Brackstone began the erosive process whereby one abdicates responsibility for his own client. (EH Tr. 218). This was a case where attorney Brackstone should have assumed that the co-defendant's interests were hostile because of the statements they had given. (EH Tr. 241). Attorney William Marett testified that a joint defense is always risky unless the defendants share the same alibi and even then is not recommended in a death penalty case if there is going to be a sentencing hearing since each lawyer needs to focus on their defendant individually. (EH Tr. 91). This would particularly be true if one defendant were better educated than the other defendants, had no criminal record, and had military service or similar factors. (EH Tr. 91). In a case where the co-defendants gave incriminating statements against your client and your client did not confess or make any guilt admission, then attorney William Marett testified that he would "absolutely not" entertain on any level a joint defense with those co-defendants. (EH Tr. 91-92).

14. Attorney Charles Fels also testified that attorney Brackstone was ill-equipped to defend a case of this kind because he had withdrawn from the practice of law for a number of years, had tried very few trials, none of which were murder cases, and was not a member of any of the professional associations. (EH Tr. 221-222). As a result, attorney Brackstone had no practical experience in such a case and had only minimal training of a professional kind. (EH Tr. 222).

15. Further, attorney Fels was highly critical of attorney Brackstone's losing, misplacing or allowing the destruction of his legal file in this matter. (EH Tr. 220-221). He indicated that it is commonplace for trial counsel to preserve the file in order to pass it on to successor counsel. (EH Tr. 243).

16. Attorney Charles Fels outlined the major problems and major defects or failures of attorney Brackstone resulting in prejudice. (EH Tr. 222). The initial failure was the failure to investigate. (EH Tr. 222). Fels stated that Brackstone's investigation was perfunctory, involved very limited work, and resulted in attorney Brackstone being astonished to have Mr. Groseclose's first statement introduced into evidence because he had simply forgotten that he had seen it before. (EH Tr. 222-223). According to Fels, there was a failure to investigate because attorney Brackstone never interviewed witnesses that concerned the co-defendants who had given incriminating statements against Mr. Groseclose. (EH Tr. 223). Fels further stated that under such circumstances where the defendant insists upon his innocence, the defense attorney must mount a strict scrutiny of the backgrounds and circumstances of the individuals whose statements incriminate the defendant and conduct an independent investigation in an effort to demonstrate to a jury just why it is those individuals would make those statements. (EH Tr. 223). None of this investigation was done by attorney Brackstone. (EH Tr. 223).

17. The next failure of investigation in this case by attorney Brackstone was his failure to describe the nature of any investigative results to his client. Attorney Brackstone did not describe the evidence against Mr.

Groseclose to Mr. Groseclose. (EH Tr. 224). As attorney Brackstone admitted at his post-conviction testimony, the most he ever said about this to Mr. Groseclose was to the effect that the state had a lot of evidence. (EH Tr. 224). Attorney Brackstone admitted that he did not send any correspondence about the case to Mr. Groseclose. (EH Tr. 224). Attorney Brackstone failed to keep open communication with Mr. Groseclose. (EH Tr. 246).

18. Another major element of prejudice at the trial was attorney Brackstone's performance at the sentencing phase. Attorney Brackstone apparently did not comprehend how the mitigation hearing was supposed to be conducted. Again he relied upon Mr. Livingston who represented a defendant with very different interests. He called four witnesses, all of whom cumulatively hurt, not helped the Petitioner. (EH Tr. 229-230). This was "a failure of counsel." (EH Tr. 250). Attorney Brackstone failed in cross-examination concerning the Captain's Mast which first came up only because attorney Brackstone called Mr. Penley as a witness. (EH Tr. 231). Attorney Brackstone did not call Mr. Groseclose as a witness during the guilt phase, which he could have done since Mr. Groseclose repeatedly told him he was innocent and Mr. Groseclose did not have a criminal record. (EH Tr. 232). Attorney Brackstone instead called Mr. Groseclose to testify at the mitigation stage and the first evidence he elicited was to have Mr. Groseclose deny the Jury's finding of guilt which, according to Fels, constituted a "slap in the face of the Jury," and was "scarcely calculated to win points for mitigation. . . . " (EH Tr. 232). Attorney William Marett testified that this was counter-productive because, in effect, you are telling the Jury that you do not accept

what they have done, and that they have made the wrong decision. (EH Tr. 96). You are starting off on the wrong foot with the Jury. (EH Tr. 95-96). According to Fels, Petitioner Groseclose was prejudiced by the failure of his lawyer to have any comprehensive idea of what that testimony might mean at either phase and why if it were to be called upon it would make sense to call upon it first rather than second. (EH Tr. 253).

19. The next failure that prejudiced Mr. Groseclose was attorney Brackstone's failure to have the court reporter transcribe the closing arguments. This was especially prejudicial since the prosecutor made references in his final argument in the penalty phase about the possibility of parole on a life sentence. (EH Tr. 253-255; EH Tr. 105-106). This was clearly error and later a "member of the Jury asked a question that related directly to it." (EH Tr. 255).

20. There was also a failure of trial counsel with respect to cross-examination of witnesses generally. In addition to the above examples, Mr. Brackstone only cross-examined 17 of the 39 or 40 witnesses called by the state of Tennessee. (EH Tr. 228). Some of these witnesses were important and critical such as the mother of the victim and Mr. Taylor and Mr. Shanks who were invited to participate in the murder. (EH Tr. 228-229). Attorney William Marett also testified that a reasonably effective trial lawyer should interview the family of the victim in connection with both the guilt phase and the sentencing phase. (EH Tr. 93). As to Mr. Mount who was the most critical witness, attorney Brackstone only cross-examined him for eleven pages in what attorney Charles Fels described as "a remarkably limited effort for a critical

major witness against your client." (EH Tr. 228). In fact, attorney Charles Fels noted that at one point the District Attorney objected to attorney Brackstone's cross-examination as being "trivial." (EH Tr. 251). Overall, Brackstone's cross-examination during the guilt phase testimony totaled 75 pages of transcript out of 1,600 pages. (EH Tr. 228).

21. Another major failure that prejudiced Mr. Groseclose was attorney Brackstone's failure to develop a theory of defense. As attorney Charles Fels testified, the key to criminal defense is to assess the nature of the evidence, make an independent investigation and decide on the basis of all the facts what the defendant's best position is in terms of either making certain admissions and seeking to mitigate them or deciding to deny them entirely. (EH Tr. 226). He further stated that the reasonable and usually competent attorney will be able to tell you in a sentence or two just what is the theory of the defense. (EH Tr. 226). Attorney Brackstone, when asked at the post-conviction hearing, could only say, "My theory was to do the best I could with what I had." (EH Tr. 226-227). Such a theory, according to Fels, amounts to "an admission of defeat." (EH Tr. 227). At another point, attorney Brackstone says he tried to show that Mr Groseclose "was not there" but as the Court of Criminal Appeals pointed out, that was an issue that was never in dispute and according to attorney Fels "if anything would seek to advance the interest of the prosecution." (EH Tr. 227).

22. The next major failure by attorney Brackstone that prejudiced Mr. Groseclose concerned the medication administered to Mr. Groseclose. There were numerous

areas of prejudice in this matter since such medication could impair the trial attorney's ability to communicate with the client and could have a negative impact on the client's ability to testify. (EH Tr. 224-225). In fact, Mr. Groseclose did testify [at the sentencing phase] and "was apparently under heavy medication at the time" and any professional attorney would want to know what effect that medication had on Mr. Groseclose's appearance, especially as to his credibility in the eyes of the Jury. (EH Tr. 225; EH Tr. 105). According to Marett, a reasonably effective trial lawyer should have investigated what medications his client was taking, especially "if it is brought to your client, essentially forced him in the sense that the deputy sheriff hands it to him and says, 'Take this.' " (EH Tr. 103).

23. Also testifying about medication given to Petitioner Groseclose in the Shelby County jail was John Bunso, who worked in the County jail in 1977 and 1978. (EH Tr. 368). Mr. Bunso stated that the doctor involved was Dr. Donald Earl who did "a lot of plastic surgery on movie stars" and came up to the jail because "he wanted something to do." (EH Tr. 376). Mr. Bunso spent two pages of testimony (EH Tr. 374-375) saying that he did not know or did not recall what Mr. Groseclose said to anyone about the medication. Mr. Bunso could not remember whether Mr. Groseclose was brought up by himself or with other inmates (EH Tr. 378); could not recall whether the medication was prescribed throughout the whole trial without reviewing records that are "someplace" (EH Tr. 377). But Mr. Bunso did recall that Fernand Brackstone, attorney for Mr. Groseclose, did not interview him. (EH Tr. 378-379). When Mr. Bunso identified the medical

records on redirect examination, he then testified on cross-examination that the medical records were very incomplete. For example, the medical records say with respect to the medication to "Recheck Monday" (EH Tr. 383) but there is no entry as to whether Mr. Groseclose was ever rechecked. (EH Tr. 383-384). Then the medical records say that Mr. Groseclose is to be given 400 milligrams of Meprobamate four times a day for four days beginning February 22, 1978. (EH Tr. 385-386). There is no entry on February 26 that the medication stopped because according to Mr. Bunso it "didn't have to say that because he [the doctor] said his statement is there like a prescription. Four days. You stop at the end of four days." (EH Tr. 386-387). But then the medical records have an entry dated March 7, 1978 that says "Reduce Meprobamate." (EH Tr. 387). Mr. Bunso was asked why there is an entry on March 7, 1978 that says "Reduce Meprobamate," if the medicine was only given to Petitioner for four days starting February 22. (EH Tr. 387). Mr. Bunso could not answer the question based on the record. (EH Tr. 387).

24. Further, when the other attorneys put their clients on the stand at the close of the guilt phase to testify that they had decided not to take the witness stand, which was a common procedure at the time, attorney Brackstone instead called Mr. Groseclose to the stand to testify that Mr. Groseclose was the one who had decided to go to trial by pleading not guilty. Only intervention by the trial judge raised the correct question of whether Mr. Groseclose understood that he had a right to testify. (EH Tr. 233-234). Attorney William Marett testified that in a case such as Mr. Groseclose's trial, the trial attorney

should be advising the defendant that his only realistic chance is to testify during the guilt phase where the defendant has consistently insisted upon his innocence and testify that the co-defendants are wrong. (EH Tr. 98).

25. The next prejudicial failure by attorney Brackstone, according to Fels, was his waiver of an opening statement at the sentencing phase of trial. A reasonably effective attorney would want to use that opportunity to tell the Jury why they should spare his client's life. (EH Tr. 234). To give or waive such an opportunity was "a remarkable decision." (EH Tr. 234). Then in closing, attorney Brackstone argued for only nine minutes.

26. In conclusion on this issue of attorney Brackstone's incompetence prejudicing the outcome of the trial, attorney Charles Fels was asked "Would this list, a catalog of sins and omissions and commissions that you have described, deficiencies in Mr. Brackstone's performance that you have given your opinion to, would it have reasonably resulted in prejudice to the defendant in Mr. Groseclose's position in this trial?" Mr. Fels replied, "whenever you have a lawyer who simply does not believe in the defense case and becomes, in effect, an ally of the prosecution, it is inherently prejudicial." (EH Tr. 234-235). In his opinion, attorney Brackstone abandoned his client in this case and denied him "effective assistance of counsel in the most fundamental sense." (EH Tr. 235). There was no vigorous advocacy of the defendant's cause at this criminal trial and there was a failure to mount a zealous case. (EH Tr. 257). For example, there was no investigation or consideration by attorney Brackstone of the example of a defense given by attorney Fels that trial

counsel could have used a defense of blaming codefendants Rickman and Britt who for reasons known only to them had decided to implicate Mr. Groseclose into the murder conspiracy by fabricating his involvement. (EH Tr. 248; EH Tr. 100, 190). Attorney Brackstone was asked about this specifically at the post-conviction hearing and testified that attacking the story of Rickman and Britt was not part of his theory of defense. (PC Tr. 376-377; EH Tr. 256-257).

27. Petitioner Groseclose called expert witness William J. Marett, Jr. Mr. Marett is an attorney licensed to practice in Tennessee who does trial practice of which about fifty percent is criminal defense. He has tried criminal cases in Memphis, has assisted in several post-conviction proceedings in Memphis, has attended CLE criminal law seminars in Memphis sponsored by the Memphis-Shelby County Public Defender and Federal Public Defender office of the Western District of Tennessee as well as those sponsored by the Tennessee Bar Association and the Tennessee Association of Criminal Defense Lawyers. He is a member of the Criminal Justice Panel for the United States District Court for the Middle District of Tennessee and was a contributor to "Tools for the Ultimate Trial", a death penalty manual published [sic] the Tennessee Association of Criminal Defense Lawyers. (EH Tr. 76-78). Attorney Marett has read the entire Groseclose record and transcript and prior to 1985 Mr. Marett practiced law with Mr. Groseclose's present attorney and prior to 1985 Mr. Marett from time to time assisted in the

representation of Mr. Groseclose in state court post-conviction proceedings. (EH Tr. 79-80)[3]

28. Attorney William Marett testified that attorney Brackstone failed to perform at the level of skill and competence required of Tennessee attorneys and that attorney Brackstone failed to conduct proper investigation, failed to keep his client advised, failed to involve his client in the preparation of a defense, and was "clearly ineffective and incompetent to represent Mr. Groseclose." (EH Tr. 82-83).

29. According to attorney William Marett, it is the obligation of the defense attorney to investigate all of the

---

[3] Opposing counsel objected to Mr. Marett's testimony on the grounds that he cannot act as both counsel and witness. First, Mr. Marett is not now nor has he ever been counsel of record in this case of *Groseclose v. Bell*, Case No. 3:89-0662. Mr. Marett testified in fact that he has had no connection with Mr. Groseclose or his case in the last ten years and that his prior representation of Mr. Groseclose would not affect his opinions. (EH Tr. 80). Second, in the alternative the rules of the Tennessee Supreme Court that govern professional responsibility of attorneys in Tennessee (Rule 8) provides in EC 5-10 that "Where the question arises, doubt should be resolved in favor of the lawyer testifying and against becoming or continuing as an advocate." Third, *Whalley Dev. Corp. v. First Citizens Bancshares, Inc.*, 834 S.W.2d 328 (Tenn.Ct.App. 1992), holds that the Code of Professional Responsibility does not absolutely prohibit a lawyer from testifying at trial when he is also counsel of record and notes that the matter is within the discretion of the trial judge. The court in *Whalley Dev. Corp.* also confirmed again that any doubts about such an issue should be resolved in favor of the lawyer testifying. The Court accepted the testimony of Mr. Marett as admissible.

facts surrounding the bringing of the charge and to determine if there are witnesses to be called. (EH Tr. 83). It is also essential that the defense attorney find out as much as he can about the defendant himself. (EH Tr. 83). In a death penalty case the investigation must be much more extensive because, according to Marett, "you are presenting the entire life of who the defendant is, his experienced, to the Jury." (EH Tr. 84).

30. Attorney William Marett noted that there were several publications in existence at the time of the Groseclose trial that specifically outlined these investigative obligations in a criminal case. (EH Tr. 84). Further, the Tennessee death penalty statute was a new law so there was considerable discussion in the professional literature about an attorney's obligations in such a case. (EH Tr. 85).

31. Attorney William Marett testified that the defense attorney cannot make a determination as to whether or not his client can testify or should testify until he or she has investigated the client's background. (EH Tr. 85).

32. Attorney William Marett testified that in defense of any criminal case, investigation must be wide-ranging; not only must the defense lawyer investigate to determine whether there are witnesses to provide factual information about the whereabouts of the defendant during the crime with which he is charged, but that in all criminal cases the eventuality of a conviction and a sentencing hearing must be prepared for and anticipated and this "clearly requires" the defense attorney to investigate the defendant's background to determine if there are

family members, friends, employers, educators who can testify as to what is an appropriate sentence for the defendant and to present a case for mercy to the sentencing authority. (EH Tr. 86; EH Tr. 109-110).

33. Attorney Marett testified that attorney Brackstone did not ask for an on the record hearing about the medication (EH Tr. 111); did not file the kind of pre-trial motions that a reasonably effective attorney would (EH Tr. 111-112); failed to order the entire trial transcript (EH Tr. 112); failed to present any proof of Mr. Groseclose's conduct in the jail awaiting trial (EH Tr. 112); failed to interview the crime incident witnesses such as Aline Davis, Pam Baker, Sgt. Childers, and others (EH Tr. 186); failed to interview or call other family members to testify (EH Tr. 112); failed to introduce Mr. Groseclose's military records (EH Tr. 112); failed to call expert witnesses to testify (EH Tr. 112); failed to call witnesses concerning Mr. Groseclose's religious activities and church attendance (EH Tr. 112-113); failed to put on proof about Mr. Groseclose's volunteer activities in the community (EH Tr. 113) and generally just followed in the footsteps of and did whatever attorney Livingston did. (EH Tr. 113). Attorney Marett testified that Mr. Groseclose's trial was prejudiced because of these failures and because of attorney Brackstone having no theory of the case as to a defense. (EH Tr. 114). Attorney Brackstone did not call a single witness or put on any proof during the guilt phase and waived his closing argument. (EH Tr. 188). At the post-conviction hearing, however, attorney Brackstone inaccurately claimed that he did put on proof during the guilt phase. (EH Tr. 188-189).

34. Marett stated that for every witness defense counsel must determine the strengths and weaknesses of that particular witness through investigation. (EH Tr. 87-88). In a case where the defendant had an honorable discharge and service with commendation medals in Vietnam, defense counsel would want to present witnesses and evidence about it. (EH Tr. 89). Marett testified that the best thing about military record evidence is that you can present it as an official government document that speaks for itself. (EH Tr. 89).

35. Testimony that was effective for co-defendant Britt in winning life imprisonment over the death penalty was evidence of his relatively youthful age, his lack of a criminal record, and expert witnesses on sociological or religious matters relating to Mr. Britt. (EH Tr. 312).

36. Mr. Groseclose specifically suggested to attorney Brackstone that a minister should be called to testify, but attorney Brackstone did not do so. (PC Tr. 203-204). Attorney William Marett testified that evidence about the defendant's church involvement, religious activity, or church attendance would be an absolutely relevant matter to investigate and present in a death penalty case. (EH Tr. 94-95, 108). Gladys Adams is the General Overseer of the Church of God in Memphis and acts today as the chief religious and administrative officer of that church. (EH Tr. 16). Reverend Adams testified that in 1977 and in 1978 she knew Mr. Groseclose because he was a neighbor of her son and her daughter-in-law babysat his children. (EH Tr. 17). She would see Mr. Groseclose about once every week or two weeks at her son's house. (EH Tr. 26). Also, Mr. Groseclose visited her house, worked on her car, and was well-known/well-liked in the neighborhood.

(EH Tr. 17). At that time Mr. Groseclose did not attend her church but attended a Methodist church. (EH Tr. 17). From July 1977 until trial in February 1978, while Mr. Groseclose was incarcerated in the Shelby County Jail, Reverend Adams ministered to him weekly in the jail. (EH Tr. 17). Reverend Adams believes that Mr. Groseclose was sincere in his professing his Christian faith to her on many occasions. (EH Tr. 18). As reverend Adams said, " . . . I have been in church work all of my life and I am now 72 and you finally reach an ability – not every time – but most of the time of evaluating whether a person is sincere. And I also rely on the Holy Spirit to confirm to me whether a person is sincere." Not only did Reverend Adams believe Mr. Groseclose was sincere, her church subsequently ordained or licensed Mr. Groseclose as an ordained minister. (EH Tr. 18-19).

37. Reverend Adams was present in Memphis when Mr. Groseclose's criminal trial took placed. (EH Tr. 19). She would have been available to testify on his behalf on request by attorney Brackstone. (EH Tr. 19-20). Attorney Brackstone never talked to her about the possibility of being a witness and never talked to her son (Mr. Groseclose's neighbor) about the possibility of being a witness. (EH Tr. 20). Reverend Adams personally attended the trial (EH Tr. 20) and introduced herself to attorney Brackstone as the minister who had ministered to Mr. Groseclose in jail. (EH Tr. 22). Attorney Brackstone still did not issue a subpoena for her and did not ask her to testify. (EH Tr. 22).

38. Attorney Brackstone could also have called other ministers and religious authorities. Bishop Kenneth L. Carder is the Bishop of the Methodist Church for the

Tennessee and Memphis Conferences comprised of about 1,100 churches in Tennessee and Kentucky. (EH Tr. 31). Bishop Carder is a magna cum laude graduate of East Tennessee State University who received his Master of Divinity from Wesley Theological Seminary and his Doctor of Ministry from Vanderbilt. He has served pastoral appointments in Johnson City, Tennessee, Bluff City, Tennessee, Knoxville, Tennessee and Oak Ridge, Tennessee. He has been active in civic and community involvement throughout Tennessee including service on a statewide criminal justice panel appointed by the Governor in 1977. Bishop Carder has organized volunteer chaplaincy programs in county jails since the late 1960s and has lectured and led workshops on criminal justice issues for at least 25 years. (EH Tr. 31-35).

39. Bishop Carder has chaired task forces in Tennessee on criminal justice and in 1977 received considerable media publicity in both newspapers and television for his work on the statewide criminal justice panel. Bishop Carder would have been available to testify at the penalty phase of the trial if asked to do so in Mr. Groseclose's case in 1978 in Memphis. (EH Tr. 37-38). Bishop Carder would have testified "that in a whole body of Christian literature and ethical position, that the death penalty is contrary to our Christian understanding of life and the criminal justice system; that it violates the very teachings, spirit and example of Jesus. It is also contrary to our United Methodist official position as approved by the General Conference, which is the legislative body of our church." (EH Tr. 38-39). Bishop Carder would also have testified at Mr. Groseclose's trial that the death penalty should not be imposed because it removed the possibility

of redemption and "puts in the hands of human beings that which belongs to God. . . . " and "counters our understanding that retribution is not a valid aspect of the criminal justice system." (EH Tr. 39).

40. Bishop Carder was asked hypothetically that if Mr. Groseclose had a long childhood of troubles ranging from absent parents to an invalid mother and Mr. Groseclose had no prior criminal record and exhibited willingness and ability to perform volunteer work in the community and had an exemplary record in the county jail awaiting trial, whether that would affect his opinion that he would have given the Jury as to the possibility of redemption for such a de4fendant. Bishop Carder, in response to this hypothetical question, testified that a person who would have demonstrated those qualities would be a candidate for rehabilitation, redemption, and restitution. (EH Tr. 40-41).

41. Another minister who could have testified in the Groseclose trial if asked is the Reverend Joseph Ingle. Reverend Ingle has been very active in organizing groups opposed to the death penalty in Tennessee and throughout the south, primarily the Southern Prison Ministry and the Southern Coalition on Jails and Prisons. (EH Tr. 51). Reverend Ingle organized in churches and with other ministers to counsel or minister to prisoners (EH Tr. 52) and edited and published a newsletter about the work against the death penalty and for criminal justice reform in Tennessee. (EH Tr. 53).

42. That newsletter was routinely sent to defense attorneys. (EH Tr. 53). Reverend Ingle lobbied in the Tennessee legislature, worked with groups in Memphis,

worked with the American Bar Association, the Tennessee Bar Association, and the Tennessee Association of Criminal Defense Lawyers in the 1970s. (EH Tr. 53, 57). He specifically tracked death penalty cases and had a clipping service to keep up with the death penalty indictments where he and his organization could then "inititate correspondence to the lawyers . . . trying to help." (EH Tr. 54). Reverend Ingle would have routinely done that with respect to the 1977 indictment against Mr. Groseclose. (EH Tr. 54, 58-59, 64). Among other material that Reverend Ingle and his organizations would have routinely provided to defense attorneys in the 1970s would have been "booklets that were available for trial lawyers, how to do a death penalty trial, focus on the sentencing phase, focus on the entire trial breakdown, voir dire, the whole nine yards, everything that takes place in a death penalty trial." (EH Tr. 55). They would have put the defense lawyer in touch with other resources such as large firms and law professors such as Anthony Amsterdam who were willing to volunteer their services or advice. (EH Tr. 55).

43. In addition, they provided and made available a standard package of pre-trial motions for defense attorneys in 1977 and 1978. (EH Tr. 55-56). These motions concerning a death penalty trial were prepared by the Southern Poverty Law Center and included about 150 different pre-trial motions on death penalty cases with supporting briefs and memoranda of law. (EH Tr. 56). They also offered expert witnesses testimony to defense lawyers to testify at the sentencing phase of death penalty trials. (EH Tr. 59). There were other organizations that were active in death penalty litigation who would

have made resources available to assist in this case. (EH Tr. 102). Reverend Ingle would have been willing to testify in March 1978 at the penalty phase of the Groseclose death penalty trial as he had done in other cases. (EH Tr. 61). Reverend Ingle, however, was never contacted by attorney Brackstone with respect to these resources or help. (EH Tr. 56, 59).

44. The empirical record in the trial court manuscript makes it clear that expert testimony on mitigating factors (such as the testimony of Reverend Ingle and Bishop Carder offered in this case) would have been admitted by the trial judge Leonard T. Lafferty at Petitioner's trial in March 1978 by the Shelby County Criminal Court since said judge had to rule on the same issue when such testimony was offered in favor of and on behalf of the co-defendant Phillip Michael Britt. Trial attorneys for co-defendant Britt at the sentencing phase called Dr. Harry E. Moore, Jr. who was the state director or [sic] the National Conference of Christians and Jews and who had been a church minister for about 20 years. (St.Ct.Tr. 19-1920). Dr. Moore was offered as an expert in the field of religion (St.Ct.Tr. 1921) and there was a hearing regarding the admissibility of his testimony. (St.Ct.Tr. 1923). The District Attorney Hugh Stanton objected to the testimony based on relevancy, materiality, and not being pertinent to mitigation. (St.Ct.Tr. 1925). The ruling by the court was to admit such testimony:

> [The court]: I shall go ahead and permit Doctor Moore to testify and the jury may accept it, they may reject it, base upon my – And you may cross-examine and you may have a learned minister of theology come in here, General, and

you've got an opportunity to rebut. So I'll let him testify. (St.Ct.Tr. 1928).

The same ruling was made with respect to other experts such as Dr. Kirk R. Williams:

[The court]: Now, I'm going to let him testify as an expert in this area, which means he's subject to cross-examination, which means the State can rebut it under the statute, if they've got an expert witness on criminology or these social deviate behaviors. . . . So, I'm going to deny the State's motion to exclude his testimony. (St.Ct.Tr. 1894).

45. Again, Petitioner would note for the Court that these are the witnesses who testified in mitigation for co-defendnat Britt. When Britt's attorney, Thomas Paul Pera, testified on April 11, 1995 in this case he was asked in Mr. Brackstone, attorney for Groseclose, could have done the same things for his client as Mr. Pera did in investigating and preparing for the mitigation stage and Mr. Pera agreed that Mr. Brackstone could have. (EH Tr. 290). Mr. Pera was specifically asked on cross-examination if he had contacted Dr. Kirk Williams. (EH Tr. 290). Then the following exchange took place:

Q. . . . You or one of your lawyer colleagues contacted Dr. Kirk Williams at the then-named Memphis State University, solicited his assistance and preparation to both go and meet with his client numerous times and then to testify at the mitigation hearing about the deviant criminal behavior and generalized mitigating factors, correct?

A. That is correct.

Q. And you asked Dr. Williams to focus and concentrate on including your client, Mr. Britt, in the descriptions that he gave to the Jury, didn't you?

A. That is correct.

Q. You were doing a very effective job in mitigation of that, weren't you?

A. We would like to think so.

Q. Any lawyer could have gone to Memphis State University or any of the other colleges in that area or in the state and found similar type witnesses, couldn't they?

A. Yes, they could have gone and talked to a criminologist and had them interview the client and see if they could have come up with something.

Q. And no such witnesses appeared in mitigation of [sic] behalf of Mr. Groseclose, did they?

A. I don't recall one. . . .

(EH Tr. 290-291).

46. Accordingly, there can be no question based upon this empirical record that since similar testimony concentrating on the co-defendant Britt was admitted, that the same kind of evidence could have been admitted on behalf of Petitioner Groseclose.

47. Further, attorney Brackstone failed to investigate or call family members as witnesses. Doris Frazier, who is Mr. Groseclose's first cousin, testified that she has

lived in Woodbury, Tennessee continuously since before the Groseclose criminal trial. (EH Tr. 67-68). Ms. Frazier, who was a junior in high school when Mr. Groseclose was born, lived in the same home together with Mr. Groseclose until he was about six years old and she stated that Mr. Groseclose was her baby in a round-about way. (EH Tr. 68). Ms. Frazier testified that Mr. Groseclose's mother was often absent from the home because she worked part time in Maryland, hundreds of miles away. (EH Tr. 68-69). Ms. Frazier testified that Mr. Groseclose's grandmother acted as a surrogate parent along with Ms. Frazier. The grandmother died when Mr. Groseclose was in high school and Ms. Frazier moved out to get married when Mr. Groseclose was still a child. (EH Tr. 69-70). Ms. Frazier testified that Mr. Groseclose's mother and father were divorced and Mrs. Groseclose later married a man named Taylor. (EH Tr. 70). Ms. Frazier testified that when Mr. Groseclose was in high school his mother became an invalid as the result of an accident and had to be cared for in her home. (EH Tr. 70). Ms. Frazier maintained her contact with Mr. Groseclose, visiting "quite often," after she moved away from their home. (EH Tr. 70, 72). Ms. Frazier was never contacted by attorney Fernand Brackstone for information or to be asked to testify at trial. (EH Tr. 71). If attorney Brackstone had asked her to come to Memphis and testify in February or March 1978, she "absolutely" would have done so. (EH Tr. 71). To her knowledge, attorney Brackstone did not contact any of Mr. Groseclose's family members. (EH Tr. 71).

48. Another witness who could have testified at trial in 1978 but was not interviewed and was not called was Samuel J. Spille. Mr. Spille was a Memphis resident

who served in the Navy over 30 years and retired in 1971 and worked for the Assessor's office and City Treasurer's office until 1992 and is not fully retired. (EH Tr. 202-203). Mr. Spille has been active in volunteer work in the Memphis community primarily in the Shelby County Auxiliary Probation Service since 1971 through the present. These auxiliary volunteers supervise juvenile court probationers, make monthly reports on them, keep the court informed of their progress, and report to the court. (EH Tr. 203-204). In 1977 and 1978 Mr. Spille was a Division Chief of this auxiliary volunteer service and one of the volunteers working under him from 1973 through the time of his arrest was Petitioner Groseclose. (EH Tr. 204). Mr. Spille testified that Petitioner Groseclose was assigned probationers and carried out the duties described above and did an average job in these volunteer services. (EH Tr. 205). Mr. Groseclose did this volunteer work continuously from 1973 or 1974. (EH Tr. 205). Mr. Spille was never interviewed or contacted by attorney Brackstone. (EH Tr. 205).

49. Another family member who could have testified is Karen Naylor, Mr. Groseclose's cousin, who testified that Mr. Groseclose was like a big brother to her. (EH Tr. 195-196). She would have been available to testify in February or March 1978 but was never contacted and never interviewed by attorney Brackstone. (EH Tr. 196).

50. Ms. Naylor testified that she came to Memphis in 1978 for the motion for new trial hearing in Mr. Groseclose's case and spoke to Mr. Groseclose at the jail, who complained at the time about attorney Brackstone's representation and complained that he was under the influence of some kind of drug, saying, "Karen, I think I

might have laughed through it. I don't even know what happened." (EH Tr. 197). Ms. Naylor then confronted attorney Brackstone and asked why the family had not been contacted (EH Tr. 197) and asked if it was true that Mr. Groseclose had been drugged at trial and attorney Brackstone said, "Yes, ma'am. We have to keep them under control somehow and that is normal procedure." (EH Tr. 197-198).

51. As Petitioner William Groseclose testified in his deposition on February 9, 1995, he was stopped by the county medical personnel on his way to court and first administered Dalmane and Meprobamate. (Groseclose Dep. at 4-5). Mr. Groseclose did not request the medication (Groseclose Dep. at 5) and cannot remember how many times a day it was given because he was really "foggy" during that time. (Groseclose Dep. at 6). There was no appointment requested by Mr. Groseclose and Mr. Groseclose never asked for or indicated that he was having any trouble sleeping. (Groseclose Dep. at 62; PC Tr. 233). The Shelby County jail had "set up an appointment for us" to see the physician or physician assistant and that person said he was giving the pills to help with a sleeping problem. (PC Tr. 223).

52. The other primary effect of this medication was to make it so that Mr. Groseclose "wasn't too able to notice anything." (Groseclose Dep. at 8). With respect to the medication, Reverend Adams, who attended the trial and had observed Mr. Groseclose closely during her weekly ministering to him in jail, testified that at trial Mr. Groseclose did not act very alert or normal, unlike his usual highly intelligent, vibrant self. (EH Tr. 24). Attorney

Brackstone admitted in 1982 that at one point during the trial he had to tell Mr. Groseclose to stop giggling because the Jury does not like to see things like that. (PC Tr. 383). When asked how the medication affected him, Mr. Groseclose replied that he was sleepy and drowsy all the time. He indicated that if he got still or quiet for any length of time at all he would start nodding and go to sleep. He recalled that he had no appetite at all but stayed cotton mouthed or thirsty all the time. He further stated, "I really don't remember too much how I was because I just didn't feel anything. I just wanted to sleep all the time." (Groseclose Dep. at 62-63). The medication made it very difficult to wake up and made it so that he did not have any energy. (PC Tr. 234). This medication was administered seven days a week and made it so that Mr. Groseclose had to fight to stay awake. (PC Tr. 235). A couple of time during the trial he went to sleep and on several occasions he would nod over on Mr. Rickman's shoulder and be pushed awake. (PC Tr. 235-236). As a result, Mr. Groseclose was not able to take in everything that happened in the courtroom. (PC Tr. 236). The drugs affected his memory and affected his ability to be clear-headed and hold a train of thought. (PC Tr. 239-240). Mr. Groseclose had never been prescribed either of these two drugs before. (PC Tr. 238). One of the other effects was that Mr. Groseclose was very "hazy" about being on the witness stand during the sentencing phase of his trial. (Groseclose Dep. at 61-62, 66). Trial attorney Brackstone never requested the court to cease medicating Mr. Groseclose unlike the actions taken by attorney Pera, co-counsel for defendant Britt. (EH Tr. at 298-301). Attorney Brackstone's primary inquiry about the medication was to ask

one of the court officers if the drugs or medication would affect Mr. Groseclose. (PC Tr. 384). Attorney Brackstone admitted that he never checked any *Physicians Desk Reference* or medical publication as to the effect of the drugs (PC Tr. 385) and admitted that he did not make any other inquiry as to the effect. (PC Tr. 385). Attorney Brackstone then changed his testimony to say that he talked to medical doctors who were not connected with the case who assured him the drugs were not exactly tranquilizers, but they were something to keep them quieter. (PC Tr. 385).

53. Mr. Groseclose was in no position to object to the medication. As he testified: "You just didn't question them [in connection with medication]. You would get your head thumped down there if you asked too many questions. If they called you to sick bay and told you they were going to give you a chest X-ray, you took it. If they called you in there and said they were going to give you a pill, you took it." (Groseclose Dep. at 21). Mr. Groseclose never requested the medication. (Groseclose Dep. at 5). Mr. Groseclose told attorney Brackstone that he was on medication during the trial and Brackstone asked if they prescribed it for him. When Mr. Groseclose answered in the affirmative, Brackstone said, "then take it." (Groseclose Dep. 40).

54. Mr. Groseclose raised this medication issue with his trial attorney. (Groseclose Dep. 63). The state did not stop giving the medication to Mr. Groseclose until about three days before he was transported to the state prison in Nashville. (Groseclose Dep. at 63).

55. Mr. Groseclose was handcuffed in front of the Jury for "a pretty good while" and handcuffed as they

were brought in and then the Jury came in. (Groseclose Dep. at 11-12). Trial attorney Brackstone made no objection.

56. A grenade detonator was introduced in front of the Jury by the prosecution. The detonator had been found at co-defendant Rickman's residence and as Mr. Groseclose testified, it was used to demonstrate a violent nature and "I was sitting right next to him and they were looking at him and me together, you know." (Groseclose Dep. at 13-14). Again, Brackstone made no objection.

57. Petitioner Groseclose testified that in many different areas his trial attorney Brackstone deferred to the co-defendant's attorney Robert Livingston. (Groseclose Dep. at 29-30). Attorney Brackstone "more or less turned everything over to Livingston . . . Livingston did not proceed the way I thought my case should proceed." (Groseclose Dep. at 37). Petitioner Groseclose testified that attorney Brackstone "said that Mr. Livingston was the lead counsel for the defense that he was just going to follow him." And "that's exactly what he did." (PC Tr. 214). Petitioner Groseclose never agreed to this arrangement. ("I didn't hire Mr. Livingston; I hired Mr. Brackstone.") (PC Tr. 214). Attorney Brackstone admitted that he worked as a team with Livingston and decided Livingston would be lead counsel. (PC Tr. 379). Attorney Brackstone relied upon attorney Livingston to ask about evidence for mitigation. (PC Tr. 388). In fact, as to the four witnesses attorney Brackstone did call in mitigation, he seemed surprised by the testimony or answers that they gave. (PC Tr. 391-392). Petitioner Groseclose pointed out

that his defense was different from that of the co-defendants and therefore Livingston could not present a unified defense. (Groseclose Dep. at 39). Attorney Pera who represented co-defendant Britt confirmed this by testifying that "Mr. Britt and Mr. Groseclose definitely had different roles in the perpetration of this crime." (EH Tr. 303). The performance of attorney Livingston in this same 1978 trial has already been ruled by this United States District Court as failing to comply with constitutional requirements. *Ronald Eugene Rickman v. Michael Dutton Warden,* No. 3:85-0256.

58. Petitioner Groseclose testified that he provided his trial lawyer Brackstone with the identity of witnesses to investigate the interview and was asked by opposing counsel what they would have provided and answered, "Character witnesses, I suppose. They – and some testimony during the trial, people said some things, you know, that were out and out lie [sic]." Petitioner Groseclose then gave specific examples including testimony given by a prosecution witness about his wife's rings. (Groseclose Dep. 31-34, 57-61). By character witnesses Mr. Groseclose meant that they could have testified about his life, how he had lived it, and the type of person he was. (Groseclose Dep. at 22). Petitioner Groseclose also wanted another witness cross-examined and two other witnesses put on the stand to rebut false testimony, but attorney Brackstone "refused to do so." (PC Tr. 214). Petitioner Groseclose identified these witnesses for attorney Brackstone, but attorney Brackstone "flat refused" because he said "we's [sic] put on our proof in the second phase. . . . " (PC Tr. 216). Further, attorney Brackstone claimed to have investigated this case by going to the Krystal on Union Street in

Memphis to check on the alleged Rickman/Groseclose meeting (EH Tr. 143) when in fact the District Attorney's office had told Brackstone that the meeting was at the Shoney's on Union Street. (EH Tr. 319).

59. Petitioner Groseclose also pointed out that attorney Brackstone should have used experts on the death penalty to testify at the sentencing phase (Groseclose Dep. at 40) such as experts who could have testified about his sociological conditions and religious matters as well as a competent psychological evaluation. (Groseclose Dep. 41).

60. Trial attorney Brackstone also failed to investigate the state's witnesses. For example, he never interviewed the family of the victim. Ms. Aline Davis Watts is the mother of the victim, who lived in Memphis and was also present at the criminal trial. (EH Tr. 349-351). Ms. Watts testified that attorney Brackstone never interviewed her about her trial testimony, never interviewed her about any of the information to which she testified, and that her only conversation with attorney Brackstone was when attorney Brackstone requested that she return a Bible to Mr. Groseclose. (EH Tr. 351). Doris Porch, the aunt of the victim, was present at the trial and admitted at the evidentiary hearing that attorney Brackstone never interviewed her about any of the criminal charges. (EH Tr. 358). Ms. Porch further admitted that she has written a book about the case and in a letter referring to the book she stated, "There are people walking free who never served a day in any jail who knew before her death that she [the victim] was going to die and knew with certainty that she had died the very day the act was carried out."

(EH Tr. 359-360). Ms. Porch further is of the opinion that Petitioner Groseclose and his co-defendant Rickman are not the only persons who should be on death row with respect to her niece. (EH Tr. 361). Attorney Brackstone never interviewed Ms. Porch about any of this. (EH Tr. 361).

61. District Attorney General Hugh W. Stanton, Jr. who prosecuted this case in 1978 testified at the evidentiary hearing and admitted that he could have called the mother, Aline Watts, [and other family witnesses like her] as a witness during the penalty phase at the original trial. (HE Tr. 325). Former District Attorney General Stanton testified that attorney Brackstone knew early on that this was a case that would have to be tried and would not be settled or plea bargained. (EH Tr. 334). Former District Attorney Stanton knew nothing about any evidence or exhibits at the criminal trial involving "a box of baby toys or a refrigerator." (EH Tr. 334-335). Petitioner Groseclose testified that attorney Brackstone claimed that the evidence the State was going to present constituted a "box of baby's toys and a refrigerator" and things that had absolutely nothing to do with the case whatsoever and that that was all they had. (PC Tr. 212). Former District Attorney Stanton offered opinions on direct as to mitigation and prejudice and on cross-examination stated that he did not know whether mitigation evidence that could have been presented would have impressed a member of the Jury or not. (EH Tr. 336-337). Former District Attorney Stanton only tried three criminal cases since 1974 including this case. (EH Tr. 337). When asked to compare the Jury's leniency for co-defendant Britt [who actually raped the victim and put her in the truck [sic] of a car, but

received life imprisonment rather than death], District Attorney Stanton agreed that co-defendant Britt was successful because of the testimony of his family members which "was a big factor in the Jury not giving Britt the death penalty" (EH Tr. 339) and testimony about his youth, his minor criminal record, and expert testimony on religion and on deviant behavior. (EH Tr. 339). Again, attorney Brackstone did not present those kind of experts or family witnesses although the former District Attorney concluded after questioning that he believed family life to be very important with regard to the Jury on sentencing. (EH Tr. 339).

62. Trial attorney Brackstone advised Mr. Groseclose that there were two phases to a death penalty trial and that the first phase of the trial is for the Attorney General's office to put on their proof and that the second phase was for the defense to put on its proof. (Groseclose Dep. at 53; PC Tr. 207-208). When Petitioner Groseclose would object or raise questions to attorney Brackstone during the trial, Mr. Brackstone indicated that it would be taken care of in the second phase. (PC Tr. 208). Trial attorney Brackstone then advised as to strategy at each phase that "there is nothing we can do in the first phase except take notes." Groseclose stated to Brackstone that he was of the impression that you have got two opposing sides and one says something and you cross-examine them. However, Brackstone reiterated that it was a bifurcated trial and the Attorney General puts on their case and the second phase is where the defense puts on their case. To his chagrin, Petitioner testified, "I found out later that's not true." (Groseclose Dep. at 53).

63. Petitioner Groseclose, in addition to requesting of attorney Brackstone that members of his family testify, also suggested other witnesses who were not contacted or called. (EH Tr. 203-204). Attorney Brackstone admitted to Petitioner Groseclose that he never talked to these suggested witnesses. (EH Tr. 204). This is confirmed by the testimony of Thomas Pera, the co-defendant's attorney, who testified that of the "numerous witnesses" that his office interviewed in connection with the Groseclose case that he cannot recall a single witness or any witness who said that he or she had been interviewed by attorney Brackstone. (EH Tr. 297). Attorney Pera testified that attorney Brackstone was not involved in any of his investigation and preparation with these numerous witnesses. (EH Tr. 294).

64. Attorney Brackstone suggested that Groseclose sell his house to raise money to pay a private investigator. (PC Tr. 206). Attorney Brackstone claimed that he was going to take the money from the sale of Mr. Groseclose's house to hire an investigator. (PC Tr. 205). Although the house was sold, there does not appear to have been any investigator and attorney Brackstone said he did not find out anything. (PC Tr. 205). When Petitioner Groseclose asked for a copy of the investigator's report, attorney Brackstone said that he had misplaced it, he did not have it any longer. (PC Tr. 205).

65. Attorney Brackstone lost, mislaid, destroyed or otherwise did not have his trial notes and file concerning Groseclose. These notes and files were requested by Petitioner Groseclose and his family within a few days after the trial (PC Tr. 229) and attorney Brackstone told them then that he had lost or misplaced them. (PC Tr. 230). Mr.

Groseclose's family volunteered to stay at attorney Brackstone's office and help him find the notes and file but Brackstone said he had an appointment and did not have time to look for them then. (PC Tr. 231). Later attorney Brackstone told Mr. Groseclose he had thrown the notes away, that they were not important, that everything would be in the transcript. (PC Tr. 231). In fact, the notes were vitally important because Brackstone had three yellow pads full of notes that he'd written down of things Groseclose objected to and had asked him about. (PC Tr. 228).

66. Attorney Brackstone made the same claims respecting his trial notes and his file about his representation of Mr. Groseclose as he did about the private investigator. Attorney Brackstone admitted he did not provide his file or notes to Mr. Groseclose or his new lawyer. First he said he did not provide them because no one could have read or understood them. (PC Tr. 403). Next attorney Brackstone said that he had moved and Mr. Groseclose's file had been "misplaced or destroyed." (PC Tr. 404). Next he said that he had "lost part of it." (PC Tr. 404). Next he said, "No, it hadn't been destroyed, to my knowledge. It might have been destroyed, but I didn't destroy it." (PC Tr. 404). Then he said that the file had been "lost or inadvertently misplaced" as he stated in a letter dated June 6, 1979. (PC Tr. 405). When asked when he lost Mr. Groseclose's file, attorney Brackstone said, "I don't know the exact time. The filing cabinet drawers fell out and papers went everywhere, and going through them trying to get them back in order, well, I couldn't find anything with that case on it. . . . " (PC Tr. 406).

Attorney Brackstone also failed to obtain a complete transcript of the criminal proceedings because he made an affirmative decision not to ask for a transcription of the closing arguments of the prosecutor and defense lawyer. (PC Tr. 397-398). Attorney Brackstone also waived various arguments that he had a right to make to the Jury. (PC Tr. 392-393).

(2) Selection of Jury Foreman

67. In Petitioner Groseclose's petition for habeas corpus relief, he specifically raised the issue of the Shelby County grand jury being selected and composed in violation of the federal Constitution under the Fifth, Sixth, and Fourteenth Amendments in that black and female grand jurors and grand jury forepersons had been systematically excluded resulting in substantial under representation. (Petition for Writ of Habeas Corpus, ¶¶ 30, 32, 33).

II. CONCLUSIONS OF LAW

A. *Claim I: Ineffective Assistance of Counsel*

A criminal defendant has a Sixth Amendment right to receive effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984). The standard for establishing "cause" as a result of ineffective assistance of counsel is two-pronged: (1) whether counsel was deficient in representing the defendant; and (2) whether counsel's alleged deficiency prejudiced the defense so as to deprive the defendant of a fair trial. *Id.* at 687, 104 S. Ct. at 2064. To meet the first prong, a petitioner must establish that his

attorney's representation "fell below an objective standard of reasonableness." *Id.* at 688, 104 S. Ct. at 2064. Mere attorney ignorance or inadvertence will not constitute "cause" unless the error rises to the level of a constitutional violation. *See Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 2566-67, 115 L. Ed. 2d 640 (1991). The "prejudice" component of the claim "focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. ___, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180 (1993).

In assessing counsel's performance, a reviewing court must be highly deferential. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. The court must determine whether under the circumstances counsel's allegedly unreasonable acts or omissions "were outside the wide range of professionally competent assistance." *Id.* at 690, 104 S. Ct. at 2066. While strategic choices made after thorough investigation are generally considered within the range of competent assistance, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S. Ct. at 2066. *See also Martin v. Rose*, 717 F.2d 295 (6th Cir. 1983) (counsel ineffective where failed to interview alibi witnesses and unaware of investigative file prepared by public defender); *United States v. Goodwin*, 531 F.2d 347 (6th Cir. 1976) (counsel ineffective where misunderstood elements of offense and examined client at preliminary hearing in such a manner that client inadvertently confessed).

The Sixth Amendment and Fourteenth Amendment requirements of effective assistance of counsel also apply

to the penalty phase of trial. *Strickland*, 466 U.S. at 687. Courts are particularly cautious in preserving a defendant's right to effective assistance of counsel at a capital sentencing hearing. *See, e.g., Kubat v. Theiret*, 867 F.2d 351, 367 (7th Cir.), *cert. denied* 110 S. Ct. 206 (1989); *Deutsher v. Whitley*, 884 F.2d 1152, 1160-61 (9th Cir. 1989); and *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir.) *cert. denied* 110 S. Ct. 573 (1989).

Groseclose asserts that he was denied the effective assistance of counsel at the guilt phase of trial because his attorney failed to investigate, prepare, or present a defense to the charges against him, at the penalty phase of trial because his attorney failed to investigate mitigating factors, prepare, and call family and expert witnesses to testify. Although State court factual findings are entitled to a presumption of correctness under 28 U.S.C. § 2254(d), the Court recognizes that the question of effectiveness of counsel raised in the instant claim is a mixed question of law and fact which is subject to a *de novo* review by this Court. *Strickland*, 466 U.S. at 698, 104 S. Ct. at 2070.

1. *Deficient representation*

The standard for measuring attorney performance is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065. Trial counsel was thus bound by a standard of care applicable when this case was tried in 1978 in Shelby County, Tennessee. The Tennessee Supreme Court established the standard applicable at that time in *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975). In *Baxter*, the court stated that attorney

competence would be measured under the "duties and criteria" set forth in *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973); the Sixth Circuit standard established in *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974)), *cert. denied*, 489 U.S. 1970, 111 S. Ct. 792, 112 L. Ed. 2d 854 (1991); and the American Bar Association Standards relating to the Administration of Criminal Justice, particularly those portions of the Standards relating to the "Defense Function." *Baxter*, 523 S.W.2d at 936.

The *Baxter* court therefore adopted the Sixth Circuit's requirement that defense counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law; conscientiously protect his client's interest, undeflected by conflicting considerations; and investigate all apparently substantial defenses available to the defendant and assert them in a proper and timely manner. *See Beasley*, 491 F.2d at 696, *cited in Baxter*, 523 S.W.2d at 935. Moreover, the court adopted the following explanation of counsel's duties from *DeCoster*:

> Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . . [T]he adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview *not* only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.

Baxter, 523 S.W.2d at 933 (citing *DeCoster*, 487 F.2d at 1204 (citation omitted)).

In the present case, the record is clear that Brackstone repeatedly failed to perform at least as well as a lawyer with ordinary training and skill in the criminal law. A lawyer with ordinary training and skill in the criminal law would have taken steps to: (1) form a meaningful and close working relationship with the client; (2) interview the client carefully and independently investigate all circumstances of the case; (3) communicate to the client all evidence against him; (4) determine statutory and non-statutory mitigating circumstances and prepare witnesses properly before they testify; (5) file meaningful pre-trial motions; and (6) object throughout the proceeding in an effort to protect the record against procedural default or waiver.

(1)-(2) Mr. Brackstone failed to form any kind of working relationship with his client and failed to investigate any of the circumstances of the case. Mr. Brackstone first met Mr. Groseclose in the Shelby County jail some time after his arrest. (PC Tr. 199-200). At that first meeting, attorney Brackstone told Mr. Groseclose that he was going to investigate the case. (PC Tr. 200). The next time attorney Brackstone and subsequent times that attorney Brackstone saw Mr. Groseclose he never said and never reported what, if anything, he investigated or what his results were. (PC Tr. 200-201). Mr. Groseclose consistently advised his trial attorney, Mr. Brackstone, that he was innocent and did not commit the crime in question. (PC Tr. 255). However, Brackstone frequently told Mr. Groseclose that he should just plead guilty and throw himself on the mercy of the court. (PC Tr. 201-202).

(3) Mr. Brackstone also failed to communicate to his client all the evidence against him. Petitioner Groseclose testified that attorney Brackstone claimed that the evidence the State was going to present was a box of baby's toys and a refrigerator and things that had absolutely nothing to do with the case whatsoever and that that was all they had. (PC Tr. 212). Brackstone failed to describe the nature of any investigative results to his client. Attorney Brackstone simply failed to describe the evidence against Mr. Groseclose to Mr. Groseclose. (EH Tr. 224). As attorney Brackstone admitted in his post-conviction testimony, the most he ever said about this to Mr. Groseclose was to the effect that the state had "a lot of evidence." (EH Tr. 224). Attorney Brackstone admitted that he did not send any correspondence about the case to Mr. Groseclose. (EH Tr. 224). Attorney Brackstone failed to keep open communication with Mr. Groseclose. (EH Tr. 246).

(4) Mr. Brackstone also failed to determine statutory and non-statutory mitigating circumstances and failed to prepare witnesses properly before they were called to testify. In fact, Mr. Brackstone failed to call many witnesses who could have been proved to be very beneficial to Mr. Groseclose. The quality of the representation afforded during the penalty stage of Petitioner's trial must be considered in light of the United States Supreme Court holding that "in capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of the defendant prior to the imposition of the death sentence." *Gregg v. Georgia*, 428 U.S. 353, 189 n.38 (1976).

The primary responsibility for insuring that these mitigating considerations are presented to the sentencing authority falls squarely upon defense counsel. A substantial failure to offer such information plainly constitutes ineffective assistance of counsel. *See Mason v. Balcom*, 531 F.2d 717 (5th Cir. 1976); *United States. v. Pinkney*, 551 F.2d 1241 (D.C. Cir. 1976). Even in non-capital cases, counsel has a constitutional obligation to present evidence to the sentencing authority of all relevant mitigating circumstances such as the background and character of the defendant. Mr. Brackstone did not call a single witness or put on any proof during the guilt phase and waived his closing argument. (EH Tr. 188; Closing Arg. Tr. 27). He then failed to present any proof of Mr. Groseclose's conduct in the jail awaiting trial (EH Tr. 112); failed to interview or call other family members to testify (EH Tr. 112); failed to introduce Mr. Groseclose's military records (EH Tr. 112); failed to call expert witnesses to testify (EH Tr. 112); failed to call witnesses concerning Mr. Groseclose's religious activities and church attendance (EH Tr. 112-113); and failed to put on proof about Mr. Groseclose's volunteer activities in the community. (EH Tr. 113). Mr. Groseclose specifically suggested to attorney Brackstone that a minister should be called to testify, but attorney Brackstone did not do so. (PC Tr. 203-204). Mr. Groseclose was licensed as an ordained minister in the Church of God in Memphis and yet Reverend Gladys Adams who is the General Overseer of the Church of God in Memphis and who today acts as the chief religious and administrative officer of that church was never called to testify. (EH Tr. 16, 19). Rev. Adams ministered to Mr. Groseclose weekly while in jail, introduced herself to Mr.

Brackstone at trial, and was available to testify but was never called. (EH Tr. 17, 19-20). Attorney Brackstone could also have called other ministers and religious authorities such as Bishop Kenneth L. Carder of the Methodist Church and the Reverend Joseph Ingle. Yet, he failed to do so.

(5) Mr. Brackstone failed to file meaningful pre-trial motions. The Supreme Court has stated repeatedly that the pretrial phase of a criminal defense is "perhaps the most critical period of the proceedings," a time when "consultation, thorough-going investigation and preparation are vitally important." *Powell v. Alabama*, 287 U.S. at 57; *accord e.g., VonMoltke v. Gillies*, 332 U.S. 708 (1948). The rationale for this assertion is fundamental: "any experienced trial lawyer knows that a purported trial without adequate pretrial preparation amounts to no trial at all." *Brooks v. Texas*, 381 F.2d 619, 624 (5th Cir. 1967). Effective counsel would raise all matters that he or she legitimately could pre-trial. (EH Tr. 238). Mr. Brackstone only filed five pre-trial motions is a case where normally effective counsel would have filed thirty-five to fifty pre-trial motions. (EH TR. 216). The five pre-trial motions that were filed did not relate to matters of substance and did not challenge the then-new death penalty statute in Tennessee. There was no *Brady* motion filed. (EH Tr. 216). Mr. Brackstone's lack of ability and ineffectiveness was also proved by his failure to make timely pretrial motions to sever Petitioner's trial, or objecting to procedures in voir dire and jury selection.

(6) Mr. Brackstone also failed to object throughout the proceeding in an effort to protect the record against procedural default or waiver. Of the 2,400 pages of actual

trial testimony, attorney Brackstone made only one independent trial objection and repeatedly failed to join in other defense objections. (EH Tr. 218).

The record clearly indicates that Mr. Brackstone failed to conscientiously protect his client's interests, undeflected by conflicting considerations. This is clearly shown in Mr. Brackstone's reliance upon Mr. Livingston to the detriment of Mr. Groseclose. Mr. Brackstone told Petitioner Groseclose that Mr. Livingston was the lead counsel for the defense and that he was just going to follow him, which is exactly what Mr. Brackstone did. (PC Tr. 214). Petitioner Groseclose never agreed to this arrangement. Mr. Groseclose did not hire Mr. Livingston, he hired Mr. Brackstone. (PC Tr. 214). Attorney Brackstone himself admitted that he worked as a team with Livingston and decided Livingston would be lead counsel (PC Tr. 379). Attorney Brackstone also relied upon attorney Livingston with regard to evidence for mitigation. (PC Tr. 388).

In short, Mr. Brackstone basically did whatever Mr. Livingston did to represent his client. (Groseclose Dep. at 29-30). He followed Mr. Livingston's lead. (EH Tr. 113, 292). That is, he virtually deferred to or turned nearly everything over to Livingston. (Groseclose Dep. at 37). Mr. Fels testified that there was no reasonable possibility of a unified defense or simply following the lead of attorney Livingston in this case because attorney Brackstone's overriding mission should have been to perfect the interests of his own client. (EH Tr. 217-218). This was a case where attorney Brackstone should have assumed that the co-defendant's interests were hostile because of the statements they had given. (EH Tr. 241). By looking to

attorney Livingston, attorney Brackstone abdicated responsibility for his own client. (EH Tr. 218). The performance of attorney Livingston in this same 1978 trial has already been ruled by this Court as failing to comply with constitutional requirements. *Ronald Eugene Rickman v. Michael Dutton*, No. 3:85-0256, (M.D. Tenn. decided April 25, 1994).[4]

Mr. Brackstone failed to investigate apparently substantial defenses available to defendant and assert them in a proper and timely manner. In fact Mr. Brackstone failed to conduct any meaningful investigation whatsoever – factual or legal. He failed to interview the Government's witnesses as well as his own. Counsel is ineffective "if he fails to investigate sources of evidence which may be helpful to the defense." *Davis v. Alabama*, 596 F.2d 1214, 1227 (5th Cir. 1979). It is the duty of counsel to interview potential witnesses and to make independent examination of the factual circumstances involved. *Rummel v. Estelle*, 590 F.2d 103 (5th Cir.) and *Bell v. Georgia*, 554 F.2d (5th Cir. 1977) where a habeas corpus was granted solely on defense counsel's failure to make "any effort to contact" critical witnesses or "otherwise undertake any independent investigation." *Id.* at 1361.

In the present case, the record is replete with examples of Mr. Brackstone's failure to investigate and make an independent evaluation. Trial counsel Brackstone

---

[4] The Court notes that it has taken judicial notice of the *Ronald E. Rickman v. State of Tennessee* post-conviction proceedings and the proceedings in *Ronald Eugene Rickman v. Michael Dutton*, 3:85-0256, United States District Court for the Middle District of Tennessee. *See* Doc. No. 169.

received numerous suggestions from Petitioner of witnesses who should be interviewed or incidents which should be investigated and of evidence which should be obtained in order to prepare for Petitioner's defense. Trial counsel Brackstone noted each of these suggestions dutifully and informed petitioner that he would take care of it. Only when this matter was brought to trial, did Petitioner learn to his dismay that the purported investigations and interrogations conducted by trial counsel Brackstone had been in fact neglected and forgotten. None of the witnesses suggested by the Petitioner nor evidence requested by the Petitioner was presented by Mr. Brackstone in the Petitioner's defense.

During the course of the trial, Brackstone proved his lack of preparation, investigation and ineffectiveness by the conduct of the trial. Mr. Brackstone failed even to develop a theory of defense. When asked at the post-conviction hearing about his theory of defense, Brackstone could only say, "My theory was to do the best I could with what I had." (EH Tr. 226-227). At another point, attorney Brackstone says he tried to show that Mr. Groseclose "was not there" which was an issue that was never in dispute and only served to support the prosecution's theory. (EH Tr. 227).

Brackstone also exhibited to Petitioner a fundamental lack of knowledge of the bifurcated trial procedure whereby Petitioner was to be tried. Mr. Brackstone informed Petitioner that there would be two stages to the trial. The first stage was solely for the state to put on all their evidence and the second was for the Petitioner to have the opportunity to put on all his evidence. What trial counsel Brackstone was referring to in this fashion

was the guilt phase and the penalty phase of Petitioner's capital trial. This in fact was the way trial counsel Brackstone conducted himself throughout the course of the trial in that he presented no witnesses whatsoever during the guilt phase of the trial and only produced five witnesses including the Petitioner during the penalty phase of the trial.

In addition, trial counsel Brackstone displayed a lack of fundamental understanding of the nature of the process of filing objections and motions when he dismissed his failure to join in with other defense motions and objections by saying "Livingston (meaning Robert Livingston trial counsel for defendant Rickman) has already taken care of that."

Mr. Fels reviewed the 2,400 page transcript of Petitioner Groseclose's trial (EH Tr. 213), and concluded that in all of these critical areas, trial attorney Brackstone's legal representation was constitutionally deficient. (EH Tr. 215-216). Attorney Brackstone failed to perform as a reasonably effective attorney in almost every area.

Likewise, the Court finds that Brackstone failed to investigate, prepare, and present a defense for Groseclose. Brackstone failed to investigate or even recognize the defenses potentially available to Groseclose. The Court concludes that such failures by trial counsel "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064, and establish that counsel was deficient under the first prong of the *Strickland* test.

2. Prejudice

In order to prevail on his ineffective assistance of counsel claim, Groseclose must demonstrate as well that counsel's deficiencies prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. The Court recognizes, however, that there are certain situations in which it is unnecessary to demonstrate "prejudice" in order to prove ineffective assistance of counsel. *See United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984). For example, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* Where counsel thus "fail[s] to function in any meaningful sense as the Government's adversary," *Id.* at 666, 104 S. Ct. at 2051, prejudice is presumed. *Id.* at 659, 104 S. Ct. at 2047.

Functionally, a defendant may be totally denied counsel even though his attorney is physically present during the proceedings. *Lombard v. Lynaugh*, 868 F.2d 1475, 1480 (5th Cir. 1989) (citing *Cronic* for proposition that constructive denial of counsel is also presumptively prejudicial). Counsel is required to remain an "active advocate," *Evitts v. Lucey*, 469 U.S. 387, 394, 105 S. Ct. 830, 835, 83 L. Ed. 2d 821 (1985), and observe a duty of "zealous and loyal representation," *Nix v. Whiteside*, 475 U.S. 157, 188, 106 S. Ct. 988, 1005, 89 L. Ed. 2d 123 (1986). *See also United States v. Swanson*, 943 F.2d 1070, 1075 (9th

Cir. 1991) (defense counsel's actions in assisting the prosecutor constituted abandonment of counsel's duty of loyalty to client and created conflict of interest). Notably, "attorneys who adopt the role of the judge or jury to determine the facts pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment." *Nix*, 475 U.S. at 189, 106 S. Ct. at 1005 (citation omitted).

The Tenth Circuit thus recognized that "an attorney who adopts and acts upon a belief that his client should be convicted fails to function in any meaningful sense as the Government's adversary." *Osborn*, 861 F.2d at 625 (citing *Cronic*, 466 U.S. at 666, 104 S. Ct. at 2051). The *Osborn* court specifically criticized counsel for making statements to the press about his client which "could easily have come from the prosecutor, rather than defendant's counsel," *Id.* at 628, and warned that "an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants because the interests of the state and the defendant are necessarily in opposition." *Id.* at 629.

Mr. Brackstone failed to remain an active advocate who observed a duty of zealous and loyal representation of his client and thereby deprived Mr. Groseclose of a fair trial by: (1) failing to subject the prosecution's case to meaningful adversarial testing, and (2) failing to function in any meaningful sense as the Government's adversary.

Mr. Brackstone did not ask for an on the record hearing about the medication (EH Tr. 111); did not file the

kind of pre-trial motions that a reasonably effective attorney would (EH TR. 111-112); failed to order the entire trial transcript (EH Tr. 112); failed to present any proof of Mr. Groseclose's conduct in the jail awaiting trial (EH Tr. 112); failed to interview the crime incident witnesses such as Aline Davis, Pam Baker, Sgt. Childers, and others (EH Tr. 186); failed to interview or call other family members to testify (EH Tr. 112); failed to introduce Mr. Groseclose's military records (EH Tr. 112); failed to call expert witnesses to testify (EH Tr. 112); failed to call witnesses concerning Mr. Groseclose's religious activities and church attendance (EH Tr. 112-113); failed to put on proof about Mr. Groseclose's volunteer activities in the community (EH Tr. 113) and generally just followed in the footsteps of and did whatever attorney Livingston did. (EH Tr. 113). Attorney Marett testified that Mr. Groseclose's trial was prejudiced because of these failures and because of attorney Brackstone having no theory of the case as to a defense. (EH Tr. 114). Again, Mr. Brackstone did not call a single witness or put on any proof during the guilt phase and waived his closing argument. (EH Tr. 188).

Attorney Charles Fels testified that the major problems and major failures of attorney Brackstone resulting in prejudice were the failure to investigate: attorney Brackstone's investigation was perfunctory, involved very limited work, and resulted in attorney Brackstone being "astonished" to have Mr. Groseclose's first statement introduced into evidence because he had "simply forgotten that he had seen it before." (EH Tr. 222-223). There was a failure to investigate because attorney Brackstone never interviewed witnesses that concerned the co-

defendants who had given incriminating statements against Mr. Groseclose. (EH Tr. 223).

According to Fels, another major element of prejudice at the trial was attorney Brackstone's performance at the sentencing phase. Attorney Brackstone apparently did not comprehend how the mitigation hearing was supposed to be conducted. Again he relied upon Mr. Livingston who represented a defendant with very different interests. He called four witnesses, all of whom cumulatively hurt, not helped the Petitioner. (EH Tr. 229-230). Attorney Brackstone did not call Mr. Groseclose as a witness during the guilt phase, which he could have done since Mr. Groseclose repeatedly told him he was innocent and Mr. Groseclose did not have a criminal record. (EH Tr. 232).

Attorney Brackstone instead called Mr. Groseclose to testify at the mitigation stage and the first evidence he elicited was to have Mr. Groseclose deny the Jury's finding of guilt which was counter-productive and possibly even offensive to the Jury. (EH Tr. 232). Attorney William Marett testified that " . . . in effect, we are telling the Jury, 'we don't accept what you have done, you have made the wrong decision.' Your are starting off with [the] wrong foot with the Jury." (EH Tr. 95-96). Petitioner Groseclose was prejudiced by the failure of his lawyer to have any comprehensive idea of what that testimony might mean at either phase and why if it were to be called upon it would make sense to call upon it first rather than second. (EH Tr. 253).

According to Fels, the next failure that prejudiced Mr. Groseclose was attorney Brackstone's failure to have the

court reporter transcribe the closing arguments. This was especially prejudicial since the prosecutor made references in his final argument in the penalty phase about the possibility of parole on a life sentence. (EH Tr. 253-255; EH Tr. 105-106). This was clearly error and later a member of the Jury asked a question that related directly to it. (EH Tr. 255).

There was also a failure of trial counsel with respect to cross-examination of witnesses generally. In addition to the above examples, Mr. Brackstone only cross-examined 17 of the 39 or 40 witnesses called by the State. (EH Tr. 228). Some of these witnesses were important and critical such as the mother of the victim and Mr. Taylor and Mr. Shanks who were invited to participate in the murder. (EH Tr. 228-229). As to Mr. Mount who was the most critical witness, attorney Brackstone only cross-examined him for eleven pages in what attorney Charles Fels described as "a remarkably limited effort for a critical major witness against your client." (EH Tr. 228). In fact, attorney Charles Fels noted that at one point the District Attorney objected to attorney Brackstone's cross-examination as being "trivial." (EH Tr. 251). Overall, Brackstone's cross-examination during the guilt phase testimony totaled 75 pages of transcript out of 1,600 pages. (EH Tr. 228).

Another major failure that prejudiced Mr. Groseclose was attorney Brackstone's failure to develop a theory of defense. As attorney Charles Fels testified, the "key to criminal defense" is to assess the nature of the evidence, make an independent investigation and decide on the basis of all the facts what the defendant's best position is in terms of either making certain admissions and seeking

to mitigate them or deciding to deny them entirely. (EH Tr. 226). The reasonable and usually competent attorney will be able to tell you in a sentence or two just what is the theory of the defense. (EH Tr. 226). Again, attorney Brackstone, when asked at the post-conviction hearing, could only say that his theory was to do the best he could with what he had. (EH Tr. 226-227).

The next major failure by attorney Brackstone that prejudiced Mr. Groseclose concerned the medication administered to Mr. Groseclose. There were numerous areas of prejudice in this matter since such medication could impair the trial attorney's ability to communicate with the client and could have a negative impact on the client's ability to testify. (EH Tr. 224-225). In fact, Mr. Groseclose did testify at the sentencing phase and was apparently under heavy medication at the time and any professional attorney would want to know what effect that medication had on Mr. Groseclose's appearance, especially as to his credibility in the eyes of the Jury. (EH Tr. 225; EH Tr. 105). A reasonably effective trial lawyer should have investigated what medications his client was taking, especially if it was brought to his client and essentially forced on him by the deputy sheriff. (EH Tr. 103). All of these instances of counsel's deficiencies, *inter alia*, prejudiced the defense so as to deprive Groseclose of a fair trial.

The Court finds that Mr. Brackstone failed to remain an active advocate who observed a duty of zealous and loyal representation of his client and thereby deprived Mr. Groseclose of a fair trial by: (1) failing to subject the prosecution's case to meaningful adversarial testing, and (2) failing to function in any meaningful sense as the

Government's adversary as required under the Sixth Amendment. *See Cronic*, 466 U.S. at 659, 104 S. Ct. at 2047; *Osborn*, 861 F.2d at 625. Under the unusual circumstances present in this action, prejudice is therefore presumed. *Cronic*, 466 U.S. at 659, 104 S. Ct. at 2047. The Court concludes that Groseclose received constitutionally ineffective assistance of counsel at both the guilt phase and the penalty phases of trial.

B. Claim 2: Selection of Jury Foreman

The pivotal question in this matter is whether Petitioner Groseclose, a white male, has standing to raise the issue of racial discrimination based on exclusion of African-Americans and the issue of sexual discrimination based on the exclusion of women. In their answer, the respondent argued that Petitioner Groseclose lacked standing in reliance on *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972) and *Cartaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977).

Because Petitioner's conviction has been set aside on other grounds and the Supreme Court has not yet ruled as to whether a defendant must be a member of the excluded group in order to raise a due process claim, the Court declines to render a decision concerning constitutional issues unnecessary to the decision of the case before it. *See Alexander v. Louisiana*, 405 U.S. at 633, 92 S.Ct. 1221, 1227 (1972); *See also Ford v. Kentucky*, 469 U.S. 984 (1984).

C. Claim 3: Cumulative Errors

The Sixth Circuit has recognized that errors which individually might not rise to the level of a constitutional violation may, when considered cumulatively, render a trial fundamentally unfair. *See Lundy v. Campbell*, 888 F.2d 467, 472-73 (6th Cir. 1989), *cert. denied*, 495 U.S. 950, 110 S. Ct. 2212, 109 L. Ed. 2d 538 (1990); *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983), *cert. denied*, 464 U.S 951, 104 S. Ct. 367, 78 L. Ed. 2d 327 (1983).

The Court, in its Order of April 5, 1995 (Doc. No. 184) granting Petitioner summary judgment in part, has found that Groseclose's trial was tainted by several constitutional errors. The Court found that Petitioner was convicted on the basis of the false and misleading testimony of Barton Wayne Mount (*Giglio* and *Brady* violations); was sentenced to death upon the Jury's consideration of unconstitutional jury instructions concerning "heinous, atrocious or cruel" aggravating circumstances, reasonable doubt, and unanimity; suffered an arbitrary review by the Tennessee Supreme Court under the review procedures utilized in Tennessee; suffered a failure to transcribe the closing arguments at trial so as to allow reviewing courts access to the full record on appeal; and was involuntarily and unconstitutionally drugged throughout the trial. Furthermore, the Court now finds that Petitioner was denied constitutionally effective assistance of counsel at the guilt and penalty phases of trial.

The Court concludes that even if any one of the errors found in this case does not individually require that Groseclose be given a new trial, the cumulative effect

of the errors violates due process and mandates issuance of the writ.

III. CONCLUSION

For the above-stated reasons, the Court declines to find that Mr. Groseclose was prejudiced in the selection of a jury foreman (Claim 2). However, the Court does find that Petitioner Groseclose was denied constitutionally effective assistance of counsel at the guilt and penalty phases of trial (Claim 1), and was denied due process at the guilt and penalty phases of trial due to the cumulative effect of the errors committed (Claim 3).

Accordingly, the Court hereby vacates Mr. Groseclose's conviction for first-degree murder. Furthermore, the writ of habeas corpus shall issue, unless within 120 days from the entry of this order the State affords Mr. Groseclose a new trial for first-degree murder.

An Order consistent with the findings herein is filed contemporaneously.

Entered this the 28th day of July, 1995.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

WILLIAM E. GROSECLOSE	)	
	)	
v.	)	No. 3:89-0662
	)	
RICKY BELL, Warden	)	

ORDER

In this habeas corpus proceeding under 28 U.S.C. § 2254, Petitioner William Edward Groseclose challenges the constitutionality of his 1978 conviction and sentence of death by electrocution imposed by the Criminal Court of Shelby County, Tennessee. Mr. Groseclose was tried and convicted in February of 1978 for murder in the first degree for the murder of his wife, Deborah Lee Groseclose.

Consistent with the contemporaneously filed Memorandum, the Court DECLINES to find that Mr. Groseclose was prejudiced in the selection of a Grand Jury foreman, but FINDS Petitioner was denied constitutionally effective assistance of counsel at the guilt and penalty phases of trial, and was also denied due process at the guilt and penalty phases of trial due to the cumulative effect of the errors committed.

Accordingly, the Court hereby VACATES Mr. Groseclose's conviction for first-degree murder. Furthermore, the writ of habeas corpus shall ISSUE, unless within 120 days from the entry of this order the State affords Mr. Groseclose a new trial for first-degree murder.

Entered this the 28th day of July, 1995.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

WILLIAM GROSECLOSE	)	
	)	
v.	)	No. 3:89-0662
RICKY BELL, Warden	)	
	)	

MEMORANDUM

Pending before the Court is Petitioner's Motion for Summary Judgment (Doc. No. 153) filed on January 13, 1995, to which Respondent filed a Response (Doc. No. 165) on February 13, 1995. Petitioner also filed a Supplemental Memorandum (Doc. No. 172) on February 27, 1995. The court heard oral argument on this motion on March 13, 1995. For the reasons stated below, the Court grants in part and denies in part Petitioner's Motion for Summary Judgment and *sua sponte* grants summary judgment to Respondent on some claims.

I. PROCEDURAL BACKGROUND

This is a federal habeas corpus action brought pursuant to 28 U.S.C. § 2254 in which Petitioner, William Groseclose, challenges the constitutionality of his 1978 conviction and death sentence imposed by the Shelby

County Criminal Court. Petitioner was tried and convicted in 1978 for murder in the first degree for the death of his wife.[1]

After Petitioner was convicted and sentenced to death he appealed to the Tennessee Supreme Court which affirmed the conviction in 1981. He then filed and [sic] petition for certiorari to the United States Supreme Court which was denied in 1981.

Petitioner filed his first petition for post-conviction relief in January 1982, in Shelby County, Tennessee. On December 3, 1982, the trial court entered an order denying the petition. He sought an appeal, and on February 16, 1984, the Court of Criminal Appeals affirmed the judgment of the trial court. On July 2, 1984, the Supreme Court of Tennessee denied Petitioner's application for permission to appeal. On November 26, 1984, the Supreme Court of the United States denied his petition for the writ of certiorari.

On March 31, 1986, Petitioner filed his second petition for post-conviction relief. On May 23, 1986, the trial court granted the State's motion to dismiss the petition. On February 25, 1987, the Court of Criminal Appeals entered an opinion affirming the dismissal of the petition without an evidentiary hearing. The Tennessee Supreme Court subsequently denied Petitioner's application for permission to appeal that judgment.

---

[1] Petitioner's co-defendants, Ronald Eugene Rickman and Phillip Michael Britt, were also tried and convicted of first degree murder. Mr. Rickman was sentenced to death, while Mr. Britt was sentenced to life imprisonment.

In June 1989, Petitioner filed his third petition for post-conviction relief, which the trial court dismissed. On March 6, 1991, the Court of Criminal Appeals entered an opinion affirming the dismissal of the petition. On September 9, 1991, the Supreme Court of Tennessee denied Petitioner's application for permission to appeal that judgment.

In September 1992, Petitioner filed a petition for a state writ of habeas corpus. On January 24, 1994, the Criminal Court of Tennessee, Thirteenth Judicial District, denied the petition.

Petitioner filed this federal petition on August 15, 1989. Respondent filed two motions for judgment on the pleadings with respect to procedural default issues. By Order entered November 8, 1994, the Court denied Respondent's motions for judgment on the pleadings. On January 13, 1995, Petitioner filed a motion for summary judgment as to some of his claims.

II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides in part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Advisory Committee for the Federal Rules has noted that "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the

proof in order to see whether there is a genuine need for trial." Advisory Committee Notes on Rule 56, Federal Civil Judicial Procedure and Rules (West Ed. 1990).

An alleged factual dispute existing between the parties is not sufficient to defeat a properly supported summary judgment motion; there must be a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986). The substantive law involved in the case will underscore which facts are material, and only disputes over outcome determinative facts will bar a grant of summary judgment. *Id.*, 477 U.S. at 248, 106 S. Ct. at 2510.

While the moving party bears the initial burden of proof for its motion, the party that opposes the motion has the burden to come forth with sufficient proof to support its claim, particularly when that party has had an opportunity to conduct discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552 (1986). It is true, however, that "[i]n ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962) (citations omitted).

To determine if a summary judgment motion should be granted, the court should use the standard it would apply to a motion for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. *Anderson*, 477 U.S. at 250, 106 S. Ct. at 2511. The court must determine

that a reasonable jury would be unable to return a verdict for the non-moving party in order to enter summary judgment. *Id.*, 477 U.S. at 249, 106 S. Ct. at 2511. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial' " *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) (citations omitted), *reh'g denied*, 1990 U.S. App. LEXIS 8954 (6th Cir. May 25, 1990).

III. DISCUSSION

Petitioner moves for summary judgment on several of the claims alleged in his federal habeas petition. The Court will address each claim separately.

A. Constitutionality of Jury Instruction Concerning "Heinous, Atrocious or Cruel" Aggravating Circumstance

Petitioner contends that in the jury's decision to sentence him to death, the jury considered an aggravating circumstance which was unconstitutionally vague. Respondent contends that the aggravating factor at issue is not unconstitutionally vague.

At Petitioner's sentencing hearing, the jury was instructed that it could impose a death sentence upon Petitioner if it unanimously found one or more statutory aggravating circumstances beyond a reasonable doubt. (Add. 50, Attach. Doc. 179, Trial Tr. at 2448.) The Court instructed the jury that it could find as a statutory aggravating circumstance that "[t]he murder was especially

heinous, atrocious, or cruel in that it involved torture or depravity of mind." (*Id.* at 2447.) The jury was also instructed that:

> "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflick [sic] a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

(*Id.*) The jury was instructed to render its decision by weighing all aggravating circumstances found against any mitigating circumstances. (*Id.* at 2448.)

The jury sentenced Petitioner to death based upon its finding of the following statutory aggravating circumstances:

> (1) that the defendant employed another to commit the murder for renumeration; [sic] and
>
> (2) that the murder was especially heinous in that it involved depravity of mind.

(Add. 1, Trial Tr. 2403.) The jury also found that there were no mitigating circumstances "sufficiently substantial" to outweigh the statutory aggravating circumstances. (*Id.*)

The Court has already ruled on this same issue in the federal habeas action of Petitioner's co-defendant, Ronald Rickman. Given the fact that Petitioner and Mr. Rickman were tried together, the Court adopts its findings in the case of *Ronald Eugene Rickman v. Michael Dutton*, No.

3:85-0256, (M.D. Tenn. decided April 25, 1994).[2] In that case, this Court found as follows:

> In the instant action, the jury found as a statutory aggravating factor that "[t]he murder was especially heinous in that it involved depravity of mind." The Court finds that the "especially heinous" instruction, even as limited by the definition of "heinous" as "extremely wicked or shockingly evil", is unconstitutionally vague under *Maynard*, 486 U.S. 356, 108 S. Ct. 1853, and *Shell*, 491 U.S. 1, 111 S. Ct. 313. Moreover, the instruction was unconstitutionally vague despite the inclusion of the term "depravity of mind," which the Court likewise finds unconstitutionally vague. Because the jury relied on an unconstitutionally vague aggravating factor in determining petitioner's sentence, such sentence must be vacated unless the Tennessee appellate courts cured the constitutional error.

Id. at 9-10. This Court further found that "petitioner has a state-created liberty interest in having a jury determine whether he should be sentenced to life imprisonment or death." *Id.* at 12-13. Finally, this Court concluded that any limiting construction adopted by the Tennessee Supreme Court in *Dicks v. State*, 615 S.W.2d 126 (Tenn. 1981), is insufficient both because petitioner's trial jury relied upon vague instructions and because the Tennessee

---

[2] The Court notes that it has taken judicial notice of the *Ronald E. Rickman v. State of Tennessee* post-conviction proceedings and the proceedings in *Ronald Eugene Rickman v. Michael Dutton*, 3:85-0256, United States District Court for the Middle District of Tennessee. *See* Doc. No. 169.

Supreme Court "did not conduct a constitutionally sufficient reweighing of the aggravating and mitigating factors in this case." *Id.* 15-18.

Given the Court's findings in *Rickman* discussed above, the Court concludes that Petitioner was sentenced to death upon the jury's consideration of an unconstitutionally vague aggravating circumstance. The Court finds that there is no genuine issue of material fact; therefore, the Court grants summary judgment to Petitioner as to this claim.

B. Constitutionality of Reasonable Doubt Jury Instruction

Petitioner alleges that the jury instruction concerning "reasonable doubt" given at the guilt phase of his trial violated his rights under the Sixth, Eighth, and Fourteenth Amendments. Respondent argues that Petitioner failed to raise this claim in any of his state court proceedings and thus, it is now procedurally defaulted. In the alternative, Respondent argues that the claim is without merit.

The Court has already ruled on this same issue in the federal habeas action of Petitioner's co-defendant Ronald Rickman. As noted above in Part IIIA, given the fact that Petitioner and Mr. Rickman were tried together, the Court adopts its findings in the case of *Ronald Eugene Rickman v. Michael Dutton*, No. 3:85-0256, (M.D. Tenn. decided September 2, 1994).

1. Procedural Default

As to the claim of procedural default, the Court, in *Rickman* found that on Rickman's direct appeal, the Tennessee Supreme Court affirmed his conviction after reviewing the entire record for error. *Rickman* at 41. Thus, the Court concluded that the Tennessee Supreme Court had addressed the 'reasonable doubt' claim and that there was no procedural default. *Id.* The Court concluded that "because the Tennessee Supreme Court is under the obligation to consider 'fundamental error' in jury instructions, any alleged bar to the consideration of this claim would not be 'independent' of federal law." (Citations omitted.) *Id.* at 41-42. The Court further concluded that there was "no firmly established state procedural rule requiring Rickman to object to the constitutionality of the jury instruction at trial." (Citations omitted.) *Id.* at 42. The Court found that Rickman received review of his claim on direct appeal and did not commit procedural default. *Id.* at 43.

Given the fact that Petitioner and Rickman were co-defendants and their direct appeal was conducted jointly and given the findings made in the *Rickman* habeas action, the Court finds that Petitioner did not procedurally default on his claim concerning the 'reasonable doubt' jury instruction. Therefore, the Court may address the merits of Petitioner's claim.

2. Merits

The Court in *Rickman* also addressed the merits of the 'reasonable doubt' claim. At the guilt phase of Mr. Rickman and Petitioner's trial, the following jury instruction was given:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

(Add. 50, Attach. Doc. 179, Trial Tr. at 2422.) The Court found that this jury instruction was ambiguous. *Rickman* at 46-47. Specifically, the Court found "that the 'moral certainty' language in conjunction with the 'mind rest easily' language suggests to a reasonable juror a lower burden of proof than what is constitutionally required." *Id.* Therefore, the Court concluded that the 'reasonable doubt' jury instruction given at Mr. Rickman and Petitioner's trial was unconstitutional. *Id.*[3]

The Court adopts its findings from the Rickman action and finds that the 'reasonable doubt' jury instruction given at the guilt phase of Petitioner's trial was

---

[3] The Court also found that the jury instruction error was not subject to harmless error review. *Id.* at 47; *see Sullivan v. Louisiana*, 113 S. Ct. 2078, 2082, 124 L.Ed.2d 182 (1993).

constitutionally defective. The Court finds that there is no genuine issue of material fact; therefore, the Court grants summary judgment to Petitioner as to this claim.

C. Constitutionality of the Unanimity Jury Instruction

Petitioner alleges that his rights under the Eighth and Fourteenth Amendments were violated by the trial court's failure to instruct the jury of the effect of non-unanimity and the option to recommend life imprisonment. Respondent contends that Petitioner's claim is without merit.

The Court addressed this very issue in the case of *Richard Houston v. Michael Dutton*, No. 3:86-0749, (M.D. Tenn. decided May 19, 1994). In *Houston*, this Court recognized that the pertinent law was as follows:

> In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the Supreme Court invalidated discretionary death sentencing procedures because they imposed capital sentences in an arbitrary and unintelligible way. *See id.* at 249-51, 92 S. Ct. at 2731-32 (Douglas, J.); *id.* at 293, 92 S. Ct. at 2754 (Brennan, J.); *id.* at 309-310, 92 S. Ct. at 2762 (Stewart, J.); *id.* at 311-13, 92 S. Ct. at 2763-64 (White, J.); *id.* at 364, 92 S. Ct. at 2790 (Marshall, J). States must conform to specific standards to constitutionally apply the death sentence. First, the states must avoid the "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury." *Godfrey*, 446 U.S. at 429, 100 S. Ct. at 1765. When it is the responsibility of a jury to determine whether a death

sentence is to be imposed, the jury must be properly instructed as to all aspects of the sentencing process. *Walton*, 497 U.S. at 653, 110 S. Ct. at 3057.

Second, sentencing procedures must result in the death sentence only upon the basis of rational criteria, such as retribution and deterrence, and not on the basis of whim, mistake, bias, or other irrelevant factors. *See e.g., Beck v. Alabama*, 447 U.S. 625, 637-38, 642-43, 100 S. Ct. 2382, 2389-90, 2392, 65 L. Ed. 2d 392 (1980) (invalidating charge instructing jurors to choose between convicting defendants of the most serious crime or acquitting them of any crime because it increased the risk that the death sentence would be imposed inaccurately); *Caldwell v. Mississippi*, 472 U.S. 320, 331, 333, 105 S. Ct. 2633, 2641, 2641-42, 86 L. Ed. 2d 231 (1985) (reasoning that a charge that misinformed a jury that there was automatic supreme court review of verdicts of death created a risk of inaccurate death sentences because jury believed it could err and it would be corrected on appeal).

Third, capital-sentencing jurors must be informed of and consider any mitigating evidence proffered by the defendant relating to the defendant and the offense. *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S. Ct. 2954, 2964-65, 57 L. Ed. 2d 973 (1978). This rule forbids restrictions on the introduction of mitigating evidence and instructions that impair jurors' assessment of mitigating circumstances by limiting consideration to only those mitigating factors that all twelve jurors unanimously agree are present. *Mills v. Maryland*, 486 U.S. 356, 384, 108 S. Ct. 1860, 1870, 100 L. Ed. 2d 384 (1988). For "it would be the

'height of arbitrariness to allow *or* require the imposition of the death penalty' where 1 juror was able to prevent the other 11 from giving effect to mitigating evidence." *McKoy v. North Carolina*, 494 U.S. 433, 440-41, 110 S. Ct. 1227, 1232 (1990) (quoting *id.* at 374, 100 S. Ct. at 1865) (emphasis added by Court).

The standard of review of a disputed jury instruction is " 'whether there in a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, ___ U.S. ___, ___, 112 S. Ct. 475, 482, 116 L. Ed. 2d 385 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316 (1990)). In both *Estelle* and *Boyde*, the Supreme Court was reviewing an "ambiguous" instruction.

The capital-sentencing scheme in effect at the time of Mr. Houston's trial, Tennessee Code Annotated Section 39-2404, directed "the trial judge [to] include in [the] instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances . . . which may be raised by the evidence." Tenn. Code Ann. § 39-2404(e) (1978 Supp.)[4]. The jury may reach a sentence in one of the following ways:

1. If the jury unanimously determines that . . . statutory aggravating circumstances have been proved by the state, . . . and said . . . circumstances are not outweighed

---

[4] Tennessee's capital sentencing statute has been recodified. The subsections cited here generally correspond to Tennessee Code Annotated Section 39-13-204 (1991).

by any mitigating circumstances, the sentence shall be death. Tenn. Code Ann. § 39-2404(g).

2. If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state . . . or if the jury unanimously determines that . . . statutory aggravating circumstances have been proved . . . but . . . are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment." Tenn. Code Ann. § 39-2404(f).

3. If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and . . . impose a sentence of life imprisonment. Tenn. Code Ann. § 39-2404(h).

The latter provision indicates that each juror can individually assess the circumstances and compel a sentence less than death.

Id. at 41-44.

The Court notes that the capital-sentencing scheme in effect at the time of Petitioner's trial was the same as described in *Houston*. The jury instructions given at Petitioner's trial concerning unanimity are as follows:

Section 39-2404, Sub-section (i), Tennessee Code Annotated, provides that no death penalty shall be imposed by a Jury but upon a unanimous finding of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following: [lists eleven statutory aggravating circumstances] . . .

> If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances has been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. The Jury shall state in writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify in writing that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found . . .
>
> The verdicts must be unanimous and each Juror must sign their name beneath the verdicts.
>
> If you unanimously determine that no statutory aggravating circumstance has been proved by the State beyond a reasonable doubt or if the Jury unanimously determine [sic] that a statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt; but that said statutory aggravating circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. . . .

The verdicts must be unanimous and signed by each Juror. (Add. 50, Attach. Doc. 179, Trial Tr. 2447-2449.)

The jury's verdict at the sentencing phase of Petitioner's trial was as follows:

> (1) We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

1. The defendant employed another to commit the murder for renumeration. [sic]

2. The murder was especially heinous in that it involved depravity of mind.

(2) We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the Jury, unanimously find that the punishment for the defendant William Edward Groseclose shall be death.

(Add. 1, Trial Tr. 2402-03.)

As in *Houston*, the trial court in Petitioner's case did not instruct the jury of each juror's ability to disagree and impose a sentence of life imprisonment. This Court found in *Houston* that the lack of such instructions at Houston's trial violated the second and third Eighth Amendment rules adopted by the Supreme Court. *Houston*, at 46. Moreover, the Court found as follows:

> The failure to instruct on the jurors' ability to disagree and impose a sentence of life imprisonment if at least one juror favored that outcome is unconstitutional because it had the effect of favoring the imposition of death irrationally. *See Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). In Beck it was constitutional error to base a capital conviction and sentence on a determination by a jury improperly led to believe that its only alternative was to acquit a guilty offender. *Id.* at 630, 637, 100 S. Ct. at 2386, 2389. Similarly, in Petitioner's case, it was constitutionally impermissible to base a death sentence on a determination

> by jurors falsely led to believe that a failure to arrive at a unanimous decision would prevent the jury from carrying out its duty. The effect in Mr. Houston's case was to eliminate the possibility of a sentence of life imprisonment unless there was unanimity, which is not required by Tennessee's capital sentencing statute, and irrationally favor the imposition of the death sentence.

Id.

In opposition to this claim, Respondent points to the Fourth Circuit's decision in *Evans v. Thompson*, 881 F.2d 117 (4th Cir. 1989), *cert. denied*, 497 U.S. 1010, 110 S. Ct. 3255, 111 L.Ed.2d 764 (1990). In *Evans*, the Fourth Circuit held that there was no requirement that a trial judge inform a capital sentencing jury of the ultimate result should it fail to reach a verdict. *Id.* at 123-24. The Court finds *Evans* distinguishable from Petitioner's case in that in *Evans* the pertinent state law required that a verdict must be unanimous as to either life imprisonment or death. *Id.* Under Tennessee law at the time of Petitioner's trial, however, a unanimous verdict as to life imprisonment was not required. The Court relies on its holding in *Houston* and finds that the failure of Petitioner's trial court to instruct on the juror's ability to disagree and impose a sentence of life imprisonment is unconstitutional in that it had the effect of favoring the imposition of the death penalty.

The Court also finds that the instruction given at Petitioner's trial concerning unanimity and mitigating circumstances was ambiguous. While instructing the jury, the trial court repeatedly used the term "unanimous" in

conjunction with the terms "aggravating and mitigating circumstances" and failed to explain that unanimity only applied to the aggravating circumstances. Moreover, given the jury's verdict,[5] the Court finds that there is a "reasonable likelihood" that because of the charge given at the sentencing phase of Petitioner's trial, the jury understood the instructions as preventing it from considering mitigating circumstances unless the jury agreed unanimously to that circumstance. *See Mills v. Maryland*, 486 U.S. 367, 384, 108 S. Ct. 1860, 1870, 100 L.Ed.2d 384 (1988) (requiring resentencing where jury instruction impaired jurors' assessment of mitigating circumstances by allowing or requiring consideration of only those mitigating factors that all twelve jurors unanimously agreed were present); *McKoy v. North Carolina*, 494 U.S. 433, 440-41, 110 S. Ct. 1227, 1232, 108 L. Ed. 2d 369 (1990).

In summary, the Court finds that because of the unanimity instructions given at the sentencing phase of Petitioner's trial Petitioner's Eighth and Fourteenth Amendment rights were violated. The Court finds that Petitioner's claim is meritorious. As there is no genuine issue of material fact as to this claim, the Court grants summary judgment to Petitioner.

D. Constitutionality of the Malice Jury Instruction

Petitioner alleges that he was denied a fair trial because the jury instructions given at the guilt phase of Petitioner's trial relieved the prosecution of the burden of

---

[5] The jury "unanimously" found that there were no mitigating circumstances. *See supra*, p. 13.

proving malice and required Petitioner to disprove malice. As an initial matter, the Court notes that Respondent contends that Petitioner procedurally defaulted on this claim. The Court rejects Respondent's argument in that it has already concluded that Petitioner did not procedurally default on this claim. *See William Groseclose v. Michael Dutton*, 3:89-0662, at 9-11, (M.D. Tenn. decided November 8, 1994). In the alternative, Respondent argues this claim is without merit.

In presenting his claim, Petitioner relies on this Court's opinion in *Richard Houston v. Michael Dutton*, No. 3:36-0749, (M.D. Tenn. decided May 19, 1994). In that case, the jury instruction concerning malice was as follows:

> If the State proves beyond a reasonable doubt that a killing has occurred, it is *presumed to be malicious* unless rebutted by other facts and circumstances to the contrary . . . The use of a deadly weapon by the party killing, when shown, raises a presumption of malice sufficient to sustain a charge of Second Degree Murder unless it is rebutted by other facts and circumstances to the contrary.

Houston, at 17 (emphasis added). In *Houston*, the Court found that in light of this instruction, the state "was unconstitutionally relieved of the responsibility of proving guilt for first degree murder beyond a reasonable doubt and the burden on persuasion was shifted from the state." *Id.* at 19-20. The Court also found that the constitutional error was harmful to Houston. *Id.* at 23.[6]

---

[6] The United States Court of Appeals for the Sixth Circuit recently upheld this Court's decision concerning the malice

In this case, the instructions at trial concerning malice were as follows:

> Murder is thus defined: "If any person, of sound memory and discretion, unlawfully kill [sic] any reasonable creature in being, and under the peace of the State, with malice aforethought, either express or implied, such person shall be guilty of Murder."
>
> From this definition, it is clear that malice is an essential ingredient of murder.
>
> Malice is an intent to do an injury to another; a design formed in the mind of doing mischief to another.
>
> A case of homicide cannot be murder unless at and before the killing, the wicked intent, constituting malice aforethought, exists in the mind of the slayer.
>
> Malice is either express or implied. In homicide, express malice is malice against the person killed. Implied malice is malice not against the party slain, but malice in general, or that condition of the mind of the slayer which indicates a wicked, depraved, and malignant spirit, and a heart regardless of social duty and fatally bent on mischief. . . .
>
> Under this definition of Murder in the First Degree the killing must be done Willfully, . . . Deliberately, . . . Maliciously, that is, with malice aforethought. . . .

---

instruction given in the Houston case. *See Richard Houston v. Michael Dutton*, No. 94-6064 (6th Cir. decided March 28, 1995).

> Malice is an essential ingredient of Murder in the Second Degree, and may be either express or implied. A man may intentionally kill another under such circumstances that will make the killing murder in the second degree. . . . As before stated, implied malice may be an essential element of murder in the second degree. This is where the slayer does not intend to slay the person killed. . . .
>
> In such a case, the law regards the conduct of the party causing the death, of such a character as to indicate a depraved and wicked mind and heart, regardless of social duty, and fatally bent on mischief, and hence says that when death is thus caused the party thus causing it is guilty of murder in the second degree; that is, murder in which implied malice is the essential element.
>
> Malice aforethought, as applied to the crime of murder in the second degree, covers all cases where the act is done under such cruel circumstances as are the ordinary indications of a wicked, depraved and malignant spirit, as when the punishment inflicted by a party, even upon provocation, is outrageous in its nature and continuance, and beyond all proportion of the offense, so that it is to be attributed to malignity and brutality, rather than human infirmity.
>
> Malice cannot be inferred from the deadly intent merely, because the deadly intent may be justifiable under the law;. . . .

(Add. 50, Attach. Doc. 179, Trial Tr. at 2412-2415.). The trial court also instructed the jury on the presumption of innocence and State's burden of proving guilt beyond a reasonable doubt:

> You enter upon this investigation with the presumption that the defendants are not guilty of any crime, and this presumption stands as a witness for each of them until it is rebutted and overturned by competent and credible proof. It is, therefore, incumbent upon the State, before you can convict the defendants, or any of them, to establish, to your satisfaction beyond a reasonable doubt . . . [lists elements of crime.]

(*Id.* at 2421.)

In *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979), the petitioner was charged with homicide and the trial court's instruction to the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" was held invalid because the charge violated the Fourteenth Amendment requirement that the state prove every element of a crime beyond a reasonable doubt. *Id.* at 512, 524, 99 S. Ct. at 2453, 2459. The Court found that the "fact that a reasonable jury could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that the jurors actually did proceed upon one or the other of these latter interpretations." *Id.* at 519, 99 S. Ct. 2456-57. The Court found that the conclusive presumption and the burden-shifting presumption are unconstitutional. *Id.* at 523-24, 99 S. Ct. at 2459.

In a later case, the Supreme Court applied the *Sandstrom* analysis to a malice jury instruction. *Yates v. Evatt*, 500 U.S. 391, ___, 111 S. Ct. 1884, 1891-92, 114 L.Ed.2d 432 (1991); *rev'd on other grounds in Estelle v. McGuire*, 503 U.S. 62, 73, 112 S. Ct. 475, 482, 116 L.Ed.2d 385 (1991). In *Yates*, the trial court had instructed the jury that "malice is

implied or presumed" both from the "willful, deliberate, and intentional doing of an unlawful act" and from the "use of a deadly weapon." *Id.* at ___, 111 S. Ct. at 1889. The Supreme Court found that this instruction was unconstitutional because it shifted the burden of proof on malice from the prosecution to the petitioner. *Id.* at ___, 111 S. Ct. at 1892.

Upon reviewing the malice instructions in this case, the Court finds that they are distinguishable from the instructions in the *Houston, Sandstrom,* and *Yates* decisions. The Court finds that the State was not relieved of its responsibility of proving guilt for first degree murder beyond a reasonable doubt, nor was the burden of persuasion shifted from the State. The jury was charged fully about the presumption of innocence and the State's duty to prove guilt beyond a reasonable doubt. The Court finds that this issue has been fully briefed and that no factual disputes exist. Moreover, the Court finds that there is no merit to Petitioner's claim; therefore, the Court *sua sponte* grants summary judgment in favor of Respondent and dismisses this claim.[7]

---

[7] It is permissible in this circuit for a district court to enter a summary judgment *sua sponte* so long as the losing party had the opportunity to come forward with all his evidence. *See Harrington v. Vandalia-Butler Bd. of Educ.*, 649 F.2d 434, 436 (6th Cir. 1981); *Routman v. Automatic Data Processing, Inc.*, 873 F.2d 970, 971 (6th Cir. 1989).

E. The False Testimony of Barton Wayne Mount – Giglio and Brady Violations

Petitioner alleges that at his trial the State improperly presented Barton Wayne Mount's false and misleading testimony and withheld evidence concerning Mount's credibility and the truthfulness of his testimony. Respondent argues that the Court should not consider this claim because Petitioner did not plead such allegations in his petition for habeas corpus. The Court finds that it may consider this claim in that the Court granted Petitioner's motion to amend his habeas corpus petition, allowing Petitioner to add this claim. (*See* Doc. No. 170.)

The Court addressed these same issues in the habeas action of Petitioner's co-defendant, Ronald Rickman. *See Ronald Eugene Rickman v. Michael Dutton*, at 9-13 and 33-40, (M.D. Tenn. decided Sept. 2, 1994). The Court found that co-defendant Barton Wayne Mount cooperated with the State to get the best possible offer from the State. *Id.* at 9-10. The Court found Mount agreed to testify against his co-defendants, including Petitioner. *Id.* The Court also found that prior to Petitioner's trial, the State decided that it would allow Mount to plead guilty to second degree murder. *Id.* at 10. At trial, Mount testified against his co-defendants, including Petitioner, as a witness for the prosecution. *Id.* at 11-12.

In reviewing the alleged *Giglio* violation, the Court found as follows:

> [T]he Court finds that Mount testified falsely when he stated that he had received no benefit and expected to get no benefit from his testimony. . . . [T]he Court finds that the State

> allowed Mount to testify falsely when Mount testified that he had not received or expected any consideration for his testimony; that he had not "made a deal to deal" with the District Attorney; that he faced electrocution as a possible punishment; and that the State would use his testimony against him if the State chose to do so. Instead, the State and Mount had an understanding, implicit or explicit, that Mount would receive leniency and consideration, and in fact Mount received such consideration both before and after trial. The State and Mount had an understanding that Mount's statement would not be used against him, and that Mount would not face the death penalty. The State was under an affirmative duty to correct Mount's false and misleading testimony, and the State failed to do so. . . . Because the State has not demonstrated that the perjurious testimony was harmless beyond a reasonable doubt, the Court grants the writ.

Id. at 35-37.

In reviewing the alleged *Brady* violation, the Court found as follows:

> The Court finds that the State failed to provide material evidence with which Rickman could have effectively cross-examined and impeached Mount, and which demonstrates that Mount testified falsely at trial. The Court concludes that there is a reasonable probability that the outcome of the trial would have been different if the State had provided the material to Rickman's counsel and Rickman's counsel had then used it to impeach Mount. *See Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383. . . . [T]he Court rejects the State's assertion that the claims are procedurally

> defaulted. . . . The Court finds that the State of Tennessee simply has no legitimate interest in presenting false testimony and withholding relevant evidence to convict Rickman or any other defendant.

Id. at 38-39.

As Petitioner and Mr. Rickman were tried jointly, the Court adopts its findings from the *Rickman* case and finds that Barton Wayne Mount testified falsely and that the State failed to disclose exculpatory evidence in violation of the law which denied Petitioner a fair trial. The Court finds that there is no genuine issue of material fact; therefore, the Court grants summary judgment to Petitioner as to this claim.

F. Medication of Petitioner Claim

Petitioner alleges that he was incompetent to stand trial because the State administered prescription medication and that he was involuntarily administered these medications in violation of the Fourteenth Amendment Respondent contends that the state courts found Petitioner's incompetency claim meritless and thus, this Court is bound by the state courts, findings of fact. As to the involuntary medication claim, Respondent contends that Petitioner has procedurally defaulted on it.

As an initial matter, the Court concludes that Petitioner has not procedurally defaulted on his involuntary medication claim in that the Court finds that it is an implicit part of his incompetency claim. Moreover, the Court finds that the state courts heard evidence concerning the allegation that Petitioner involuntarily received

medication during his trial and were given the opportunity to grant relief as to this claim. In Petitioner's first post-conviction proceeding, the state court heard evidence that although Petitioner never requested any medication to help him sleep or to ease his anxiety, the State administered a sedative and a depressant to Petitioner. (Add. 2, at 233-34.) Accordingly, the Court finds that it may address this claim on the merits.

The Court has already ruled on this same issue in the federal habeas proceedings of Petitioner's co-defendant, Ronald Rickman. *See Ronald Eugene Rickman v. Michael Dutton*, No. 3:85-0256 (M.D. Tenn. decided September 2, 1994). As in this case, the State in *Rickman* argued that the state Court of Criminal Appeals, findings that Mr. Rickman was able to function normally at trial are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). This Court rejected the State's argument and found that because "the findings of the Court of Criminal Appeals [did] not fully address the question of whether the State discharged its burden of demonstrating that it was medically necessary and proper to medicate Rickman," the State court findings were not entitled to a presumption of correctness and that the Court was required to make subsidiary findings necessary for proper resolution of this claim. *Id.* at 56. The Court adopts its finding in Rickman that the State court findings as to this claim are not entitled to a presumption of correctness.

The Court notes that the record from Petitioner's first post-conviction proceeding reveals that although Petitioner never requested any assistance for sleeping or for anxiety, the jail officials took him to see a psychiatrist

before the trial. (Add. 2, at 233.) The psychiatrist prescribed a sedative, Dalmane, for Petitioner, and on February 17, 1978, the day before Petitioner's trial commenced, the State began administering 30 milligrams of Dalmane to Petitioner per day. (*Id.* at 183 & 233.) On February 22, 1978, the State also began administering a depressant, Meprobamate, to Petitioner at the maximum dosage of 1600 milligrams per day. (*Id.* at 183 & 301.) Petitioner remained on these medications throughout his trial. (*Id.* at 184.) There was evidence at this hearing that both Meprobamate and Dalmane cause drowsiness and that when these drugs are combined they have a much more powerful effect on the central nervous system. (*Id.* at 302-309.) Moreover, the record establishes that Petitioner had trouble staying awake during the trial and that Petitioner felt "more clearheaded" after he ceased taking the drugs. (*Id.* at 234-39.)

As to the merits of Petitioner's claim, the Court adopts its findings from *Rickman*. The Court in *Rickman* found that the State decided to administer these drugs to Mr. Rickman and Petitioner on its own and therefore, the burden was on the State to demonstrate that the administration of such drugs was medically appropriate and was essential to promote a compelling State interest. *See Rickman*, at 56. The Court found that although Mr. Rickman and Petitioner never requested these drugs, they received them. *Id.* The Court found that the State failed to satisfy its burden that administering "mind-dulling drugs" to Mr. Rickman was medically necessary and justified by a compelling State interest. *Id.* at 57-58. Finally, the Court held that it was foreclosed from conducting harmless error review because the precise consequences of the

defendants taking these drugs could not be shown from the trial transcript. *Id.*

Given the Court's findings in *Rickman*, the Court concludes that Petitioner was unconstitutionally administered medication at his trial which rendered him incompetent. The Court finds that there is no genuine issue of material fact; therefore, the Court grants summary judgment to Petitioner as to this claim.

G. Arbitrary Review Claim

Petitioner alleges that the appellate review procedures utilized in Tennessee and in this case were inadequate and failed to comport with Fourteenth Amendment due process which resulted in the violation of the Eighth Amendment. Respondent contends that the Supreme Court's review of Petitioner's sentence complied with all constitutional requirements and therefore, Petitioner's claim is without merit.

At the time of Petitioner's appeal, Tennessee law gave a death-sentenced individual the right to automatic review by the Tennessee Supreme Court. Tenn. Code Ann. § 39-2-205(a). This same statute requires that in conducting its review of a death sentence, the Tennessee Supreme Court:

> shall determine whether (1) the sentence of death was imposed in any arbitrary fashion; (2) the evidence supports the jury's findings of a statutory aggravating circumstance or statutory aggravating circumstances; (3) the evidence supports the jury's findings of the absence of any mitigating circumstances sufficiently substantial

> to outweigh the aggravating circumstance or circumstances so found; (4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. The Tennessee Supreme Court may promulgate rules as it deems appropriate to establish such procedures as are necessary to enable it to properly review the death sentence.

Tenn. Code Ann. § 39-2-205(c)(1-4).

In 1978, pursuant to its powers under Tenn. Code Ann. § 39-2-205 to establish as needed to properly review. the death sentence, the Tennessee Supreme Court adopted a rule requiring the use of a trial judge's report in all first degree murder cases in which life imprisonment or a sentence of death is imposed. It is the trial judge's responsibility to transmit this report to the Supreme Court. *See* Rule 12 of the Rules of the Supreme Court of Tennessee.[8]

Petitioner admits that proportionality review is not required in death penalty cases by the Eighth Amendment. *See Pulley v. Harris*, 465 U.S. 37, 44, 104 S. Ct. 871, 876, 79 L.Ed.2d 29 (1984). However, Petitioner argues that given the mandatory nature of these statutes, Tennessee created a protected liberty interest in avoiding execution unless certain procedures are taken. *See Ford v. Wainwright*, 477 U.S. 399, 428, 106 S. Ct. 2595, 2611, 91 L.Ed.2d 335 (1986) (O'Connor, J., concurring) *Ford* involved a

---

[8] The Tennessee Supreme Court promulgated this rule as Rule 47 in 1978 but in 1981 it was recodified as Rule 12.

habeas corpus petition of a death row prisoner challenging state procedures. In her concurrence, Justice O'Connor held that "[o]ur cases leave no doubt that where a statute indicates with 'language of an unmistakable mandatory character' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." *Id.* at 428, 106 S. Ct. at 2611.

Petitioner contends that the Tennessee Supreme Court affirmed Petitioner's death sentence without making any specific findings regarding whether his sentence of death was (1) imposed in an arbitrary fashion, (2) excessive or disproportionate, and (3) lacking in evidentiary support for the jury's aggravating and mitigating circumstance conclusions. Petitioner also contends that the Supreme Court affirmed Petitioner's death sentence without engaging in any public and independent review to determine whether the above findings existed or not. Finally, Petitioner asserts that because of this review was so arbitrary, it violated the Eighth Amendment.

As an initial matter, the Court finds that the Tennessee statutes discussed above indeed use mandatory language; therefore, they create an "expectation protected by the due process clause." *Ford*, 477 U.S. at 428, 106 S. Ct. at 2611. The Tennessee Supreme Court has noted that it is part of its "statutory duty" to review a death sentence and determine (1) whether it was imposed in an arbitrary fashion, (2) whether the evidence supports the jury verdict with respect to aggravating and mitigating circumstances, and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. *See State v. King*, 94 S.W.2d 941, 947 (Tenn. 1985).

Respondent notes that in reviewing a state supreme court's proportionality review, a federal habeas court must give great deference to the state court and only examine whether the state court properly performed its duty under state statute. *See Moore v. Balkcom*, 716 F.2d 1511, 1517 (11th Cir. 1983), *rev'd in part on other grounds*, 824 F.2d 847 (11th Cir. 1987); *Kordenbrock v. Scroggy*, 680 F. Supp. 867, 899 (E.D. Ky. 1988), *rev'd. in part on other grounds*, 919 F.2d 1091 (6th Cir. 1990). Giving great deference to the Tennessee Supreme Court's decision in *State v. Groseclose*. the Court nevertheless finds that the court did not properly perform its required duty under state statute. The court did not make any specific findings as to whether Petitioner's death sentence was imposed in an arbitrary fashion, whether the evidence supported the jury verdict with respect to aggravating and mitigating circumstances, whether the sentence was excessive or disproportionate to the penalty imposed in similar cases. The court merely said that "the facts and circumstances of this case justify the action of the jury and of the trial judge in imposing it upon these appellants." *State v. Groseclose*, 615 S.W.2d 142, 150 (Tenn. 1981). This Court has no way of knowing if the state supreme court even looked at the required factors. For example, the Court cannot ascertain whether the state supreme court even compared Petitioner's death sentence to similar cases to determine whether his sentence was excessive or disproportionate.

In summary, the Court finds that the Tennessee statutes on their face, did not violate Petitioner's Fourteenth and Eighth Amendments; however, the statutes, as applied to Petitioner through the Tennessee Supreme

Court's review, did violate Petitioner's Fourteenth and Eighth Amendment rights. The Court finds that there is no genuine issue of material fact; therefore, the Court grants summary judgment to Petitioner as to this claim.

H. Failure to Transcribe Closing Argument and Prosecutorial Misconduct Claims

Petitioner alleges that the failure to transcribe the closing arguments violated his Sixth and Fourteenth Amendment rights. Petitioner further alleges that the nature of the District Attorney's closing argument violated his Fourteenth Amendment rights. The Court will address each claim separately.

1. Failure to transcribe closing arguments claim

Petitioner argues that the failure to transcribe closing arguments made it impossible for the reviewing state courts to analyze the considerations which motivated the death sentence. In support of this argument Petitioner relies on *Gardner v. Florida*, 430 U.S. 349, 361, 97 S. Ct. 1197, 1206, 51 L.Ed.2d 393 (1977).

In *Gardner*, the petitioner was found guilty of first degree murder. *Id.* 430 U.S. at 351, 97 S. Ct. at 1201. After the required sentencing hearing, the jury advised the court to impose a life sentence upon their finding that the mitigating circumstances outweighed the aggravating circumstances. *Id.* at 352, 97 S. Ct. at 1202. The trial judge, however, relying in part on a presentence investigation report that he had ordered and portions of which were not disclosed to the parties, imposed the death sentence

on the ground that a certain aggravating circumstance justified it and that there was no mitigating circumstance. *Id.* at 353, 97 S. Ct. at 1202. On appeal, the Florida Supreme Court rejected petitioner's argument that he was denied due process when the death sentence was imposed in part, on the basis of information he had no opportunity to deny or explain. *Id.* The record on appeal did not include a copy of the confidential portion of the presentence report. *Id.*

In reviewing the case, the United States Supreme Court held that the petitioner was denied due process of law when the death sentence was imposed. *Id.* at 362, 97 S. Ct. at 1207. The Court found that "[e]ven if it were permissible to withhold a portion of the report from a defendant, it would nevertheless be necessary to make the full report a part of the record to be reviewed on appeal." *Id.* at 360-361, 97 S. Ct. at 1206. Moreover, it found that "it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed." *Id.* The Supreme Court has since reaffirmed its finding in *Gardner. See Dobbs v. Zant*, 113 S. Ct. 835, 836, 122 L.Ed. 2d 103 (1993) (citing *Gardner v. Florida* and noting that the Court has emphasized the importance of reviewing capital sentences on a complete record).

There is no dispute that the state reviewing courts did not have the complete trial record. The appellate record did not contain transcripts of the closing arguments in either the guilt phase or the penalty phase. (Add. 1, Trial Tr. 1618-1619; 2389-2394.) Respondent, however, argues that Petitioner's claim is without merit because Petitioner had access to a full transcript but his

counsel failed to request it. The Court finds this argument unpersuasive. The Supreme Court in Gardner found that the failure of the defense counsel to request access to the full report "cannot justify the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death." *Gardner*, 430 U.S. at 361, 97 S. Ct. at 1206. Likewise, in this case, the failure of Petitioner's counsel to request the full transcript does not justify sending a record to the state appellate courts which omitted closing arguments in that the closing arguments could have been part of the basis for the jury's decision to convict and sentence Petitioner to death.

Upon reviewing the matter, the Court is concerned that the state reviewing courts did not have access to the closing argument transcripts. As the Supreme Court has noted, in a case involving a sentence of death, it is important that the reviewing court have the complete record on appeal so that the court has access to the considerations which motivated the jury to impose the death sentence. The Court finds that the closing arguments in this case are a consideration which could have motivated the jury to impose the death sentence on Petitioner. As noted earlier, the Court has already concluded that the Tennessee Supreme Court's review of Petitioner's case was arbitrary. *See supra*, Part III G. The fact that the state reviewing courts did not have access to the full record on appeal further supports that finding by the Court. In summary, the Court finds that the failure to transcribe the closing arguments at trial violated Petitioner's Sixth and Fourteenth Amendment rights. The Court finds that there

is no genuine issue of material fact; therefore, the Court grants summary judgment to Petitioner as to this claim.

2. Improper prosecutorial argument claim

As stated above, Petitioner also contends that statements made by the prosecutor in his closing argument were improper and violated his due process rights. As an initial matter, the Court notes that Respondent contends that Petitioner procedurally defaulted on this claim. The Court rejects Respondent's argument in that it has already found that while Petitioner procedurally defaulted on this claim, cause and prejudice existed to excuse the default. *See William Groseclose v. Michael Dutton*, 3:89-0662, at 12-13, (M.D. Tenn. decided November 8, 1994.) Therefore, the Court finds that it may address the merits of Petitioner's claim.

In discussing prosecutorial misconduct, the Sixth Circuit has noted that even if the charges against a defendant are heinous, "even the most guilty defendant is entitled to a fair trial." *Martin v. Parker*, 11 F.3d 613, 616 (6th Cir. 1993). In a recent case, *United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994), the Sixth Circuit established the test to be applied in reviewing claims of prosecutorial misconduct. The test is twofold; (1), whether the remarks at issue were improper; (2) if so, whether the impropriety amounts to reversible error. *Id.* at 1384-1387; *see also United States v. Blandford*, 33 F.3d 685, 708 (6th Cir. 1994) (following and explaining *United States v. Carroll*).

Under the *Carroll* test the Court must first determine whether the statements of the prosecutor during closing

arguments in this case were improper. Petitioner contends that several statements made by the prosecution during the closing arguments of both the guilt phase and the penalty phase were improper and violated his due process rights. First, Petitioner argues that during the guilt phase closing argument, the prosecutor improperly speculated as to what his thought processes and thinking was, even though he had not testified.[9] Second, Petitioner

---

[9] The prosecution's statement was as follows:

> Debbie Groseclose, on June 28, 1977, she went to bed. Did she sleep soundly; . . . Did Bill Groseclose? Did he sleep soundly that night, or did he lay on that couch, in that living room with his heart racing? These plans that have been going through his mind since November of 1976. . . .
>
> I submit he slept not a wink that night. He lay there with wild anticipation. I ask you to think, gentlemen, when Bill Groseclose got off that couch the next morning, what could be going through his mind as he walked about that house, gathering little Nathan; gathering the diapers, gathering the bag? What could this man have in his mind and in his heart, knowing what he had laid the plans for, what was about to happen to Debbie as she lay asleep in their bed that they had once shared – possibly the same bed that little Nathan, that he had in his arms, was conceived in?
>
> What could he be thinking as he allowed Phillip – as he allowed Ronald to enter thay [sic] back door as he went out the front door? What went through Bill Groseclose's mind as he drove his van that morning, at 6:00 o,clock in the morning, with little Nathan who was sick, – as he drove, where was the baby? Was he lying there? Was he in the car seat? Did his mind go back to Vistaview Cove? Was he, at that moment, imagining these plans that he had formulated; the

argues that during the penalty phase closing argument, the prosecutor improperly made reference to the issue of pardon or parole. In particular, Petitioner argues that the trial court, at the objection of Petitioner's counsel, instructed. the prosecution not to argue or mention parole. (Add. 16, Trial Tr. 128-129.) Petitioner notes that despite that ruling, the prosecution in its rebuttal closing argument stated to the jury, "Mr. Livingston stood up here before you and said, 'You've got to rest easily on this finding. Don't rely on our good Governor Ray Blanton to save their lives.' " (*Id.* at 132-33.) Third, Petitioner contends that the prosecution improperly argued to emotions and other biases by demanding that the jury "protect the other potential Debbies" (*Id.* at 135) and by arguing that the death penalty would prevent "a murder of another young woman of our city." (*Id.* at 134). Finally, Petitioner asserts that the prosecution improperly argued to the jury with reference to the defendants, "They are mean. They are greedy. And they are cold. They are inhuman, and they are animalistic." (*Id.* at 136-37.)

Upon reviewing these statements, the Court finds that while some were improper, others were not. The Court finds that the comments regarding Petitioner's thought process were not improper in that they were

---

> raping? Did he receive some vicarious thrill thinking of these two people that he'd instructed to rape, rob, murder? "Are they doing it now? Are they doing it now?" Did he achieve some sort of thrill? Could he have had any remorse in his heart and his soul as he continued to drive to the recruiting office as a part of the plans?

(Add. 16, Trial Tr. 14-16.)

merely rhetorical questions and did not suggest what Petitioner may or may not have been thinking around the time of the murder. However, the Court finds that the remaining comments in question were improper. Specifically, in light of the trial court's instruction to the prosecution not to mention parole, the remarks by the prosecutor concerning parole were improper. Moreover, the Court finds it was improper for the prosecutor to argue to the emotions and biases of the jury by making pleas for "future Debbies." Finally, the Court finds it especially improper for the prosecutor to resort to name-calling, especially calling the defendants "inhuman" and "animalistic." The Court finds such conduct by a prosecutor to be very unprofessional.

Now that the Court has determined that some of the prosecutor's statements were improper, the Court must determine whether that impropriety constitutes error. In applying this second step of the *Carroll* test, the Court must determine whether the improper statements were flagrant or not. *Carroll*, 26 F.3d at 1389-90. The *Carroll* court used the following factors to determine whether the prosecutorial remarks were flagrant:

(1) whether the remarks tended to mislead the jury or to prejudice the accused;

(2) whether they were isolated or extensive;

(3) whether they were deliberately or accidently placed before the jury; and

(4) the strength of the evidence against the accused.

Id. at 1385 & 1389. In this case, the Court finds that it is clear that the improper remarks at issue have a tendency

to mislead the jury and to prejudice the accused. However, the Court finds that the record does not indicate that such statements were extensive or deliberate. Moreover, the Court finds that there was very strong evidence against Petitioner. The Court therefore concludes that while the remarks were improper, they were not flagrant.

Once the Court has determined that the improper comments were not flagrant, the Court must apply three factors to determine whether the error was harmless or not. *Id.* at 1390 & 1385 n.6. Where the conduct is not flagrant, it will not rise to reversible error if "either proof of defendant's guilt is overwhelming, or defense counsel failed to object to the error, or if the trial court cured the error with an admonishment to the jury." *Id.* at 1385 n.6. In this case, it is clear from the record that the trial court did not cure the error with an admonishment to the jury. Moreover, while the evidence against the Petitioner at trial was strong, the Court cannot find that proof of his guilt was "overwhelming." However, the Court notes that with the exception of the comments concerning parole, Petitioner's counsel failed to object to any of the prosecutor's improper comments. The Court notes that even the objection on the issue of parole was made outside the presence of the jury and prior to the prosecutor's rebuttal closing argument; thus, there was no contemporaneous objection to the prosecutor's improper comment concerning parole.

In summary, while the Court finds that most of the prosecutorial remarks at issue were improper, they were not so improper to rise to the level of a constitutional violation. The Court finds that this claim has been fully briefed and that no factual disputes exist. Moreover, the

Court finds that this claim is meritless; therefore, the Court *sua sponte* grants summary judgment in favor of Respondent and dismisses Petitioner's claim of prosecutorial misconduct. (*See supra,* footnote 7.)

I. Infringement on Presumption of Innocence and Shackling

Petitioner alleges that he was denied the presumption of innocence and a fair trial as a result of the jury's viewing him in handcuffs at trial. Respondent argues that this claim is barred by Petitioner's procedural default. The Court rejects Respondent's argument in that it has already found that Petitioner did not procedurally default on this claim. *See William Groseclose v. Michael Dutton,* 3:89-0662, at 6-7, (M.D. Tenn. decided November 8, 1994). Therefore, the Court finds it may address the merits of Petitioner's claim.

The record establishes that defendants, including Petitioner, were handcuffed at one point during the trial. (Add. 1, Trial Tr. 695-96.) The Court addressed this issue in the habeas action of Petitioner's co-defendant, Ronald Rickman. *Ronald Eugene Rickman v. Michael Dutton,* at 58-61, (M.D. Tenn. decided Sept. 2, 1994). In that opinion, the Court recognized that it is "well-settled that a criminal defendant is entitled to a fair and impartial trial, including, as a general rule, the physical indicia of innocence. *Kennedy v. Cardwell,* 487 F.2d 101, 104 (6th Cir. 1973), *cert. denied,* 416 U.S. 959, 94 S. Ct. 1976, 40 L.Ed.2d 310 (1974)." *Id.* at 59. The Court further noted that the burden of proof is on the defendant to show that his

constitutional rights were violated by being handcuffed. *Id.* at 60. The Court also made the following findings:

> Based on the record before the Court, it appeals that Rickman was handcuffed inadvertently and without justification. . . . Nevertheless, this Court finds that the error in briefly displaying Rickman to the jury in handcuffs was not so prejudicial as to rise to the level of a constitutional violation. When the situation was brought to the attention of the court, it was immediately addressed and remedied. As well, the Court notes that prospective jurors had been questioned on the use of handcuffs and the presumption of innocence. (*Voir dire* Tr. 67-68, 395, 1165-66.) The Court concludes that Rickman has not sustained the burden of proof to establish that his constitutional rights were violated by the shackling.

Id. at 60-61.

The Court adopts its findings from the *Rickman* opinion. While the Court finds that the shackling of Petitioner at trial was unjustified, the Court also finds that Petitioner has not presented evidence to sustain the burden of proof to establish that his constitutional rights were violated by the shackling. The Court finds that this claim has been fully briefed and no factual disputes exist. The Court further finds that this claim is meritless; therefore, the Court *sua sponte* grants summary judgment in favor of Respondent and dismisses this claim. (*See supra*, footnote 7.)

J. Admission of Grenade Detonator

Claim Petitioner alleges that the admission of a grenade detonator at his trial was highly prejudicial. Respondent contends that this claim is barred by Petitioner's procedural default. The Court rejects Respondent's argument in that it has already found that Petitioner did not procedurally default on this claim. *See William Groseclose v. Michael Dutton*, 3:89-0662, at 8-9, (M.D. Tenn. decided November 8, 1994). The Court finds it may address the merits of Petitioner's claim.

The Court addressed this same issue in the habeas action of Petitioner's co-defendant, Ronald Rickman. *Ronald Eugene Rickman v. Michael Dutton*, at 51-54, (M.D. Tenn. decided Sept. 2, 1994). In *Rickman*, the Court recognized that the relevant question is "whether the admission of evidence of a grenade detonator . . . so infected the trial with unfairness as to make the resulting conviction a denial of due process. (Citations omitted.)" *Id.* at 52. The Court concluded that the trial court denied Mr. Rickman due process by allowing the jury to convict him of a capital offense based upon consideration of irrelevant and highly inflammatory evidence. *Id.* at 52-53. However, upon performing the required harmless error review, the Court found that this was "a rare instance in which the admission of improper evidence is both highly prejudicial and, at the same time, harmless." *Id.* at 54.

The Court adopts its findings from the *Rickman* opinion. While the Court finds that the admission of the grenade detonator at trial was highly prejudicial in violation of Petitioner' [sic] due process, the Court also finds

that the error was harmless. The Court also finds it noteworthy that this evidence was only connected to Petitioner's co-defendant, Mr. Rickman, and not Petitioner. The Court finds that this claim has been fully briefed and no factual disputes exist. The Court further finds that this claim is meritless; therefore, the Court *sua sponte* grants summary judgment in favor of Respondent and dismisses this claim. (*See supra*, footnote 7.)

K. Totality of Errors Claim

When considered as a whole, Petitioner argues that the constitutional errors discussed above rendered his trial unfair. Respondent argues that the Court should not consider this claim because Petitioner did not plead such allegations in his petition for habeas corpus. The Court finds that it may consider this claim in that the Court granted Petitioner's motion to amend his habeas corpus petition, allowing Petitioner to add this claim. (*See* Doc. No. 170.)

The Court recognizes that errors which individually might not rise to the level of constitutional violation may, when considered cumulatively, render a trial fundamentally unfair. *See Lundy v. Campbell*, 888 F.2d 467, 472-73 (6th Cir. 1989); *cert. denied*, 495 U.S. 950, 110 S. Ct. 2212, 109 L.Ed.2d 538 (1990); *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir.); *cert. denied*, 464 U.S. 962, 104 S. Ct. 396, 78 L.Ed.2d 327 (1983). However, at this point, the Court finds it is inappropriate to address this claim. There are many of Petitioner's claims which will not be addressed until the evidentiary hearing is held. Therefore, the Court reserves judgment on the merits of this claim until all

other claims of Petitioner are heard. Accordingly, Petitioner's motion for summary judgment as to this claim is denied.

IV. CONCLUSION

For the above-stated reasons, the Court hereby grants Petitioner's motion for summary judgment on his claims of unconstitutional jury instructions concerning "heinous, atrocious or cruel" aggravating circumstance, reasonable doubt, and unanimity; *Giglio* and *Brady* violations; unconstitutional involuntary medication; arbitrary review; and failure to transcribe closing arguments; and denies Petitioner's motion for summary judgment as to his claim of totality of errors. Furthermore, the Court hereby *sua sponte* grants summary judgment to Respondent on Petitioner's claims of unconstitutional malice instruction; prosecutorial misconduct; presumption of innocence and shackling; and prejudicial admission of grenade detonator. Accordingly, the Court finds it should dismiss Petitioner's claims of unconstitutional malice instruction; prosecutorial misconduct; presumption of innocence and shackling; and prejudicial admission of grenade detonator.

Although the Court has granted some of Petitioner's claims, because Petitioner has numerous other claims which will be heard soon at the evidentiary hearing, the Court reserves judgment at this time as to issuing the writ of habeas corpus.

An Order consistent with the findings herein is filed contemporaneously.

Entered this the 4th day of April, 1995.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

WILLIAM GROSECLOSE	)	
	)	No. 3:89-0662
v.	)	
	)	
RICKY BELL, Warden	)	

ORDER

Pending before the Court is Petitioner's Motion for Summary Judgment (Doc. No. 153) filed on January 13, 1995, to which Respondent filed a Response (Doc. No. 165) on February 13, 1995. Petitioner also filed a Supplemental Memorandum (Doc. No. 172) on February 27, 1995. The Court heard oral argument on this motion on March 13, 1995.

Consistent with the contemporaneously filed Memorandum, the Court hereby GRANTS Petitioner's motion for summary judgment on his claims of unconstitutional jury instructions concerning "heinous, atrocious or cruel" aggravating circumstance, reasonable doubt, and unanimity; *Giglio* and *Brady* violations; unconstitutional involuntary medication; arbitrary review; and failure to transcribe closing arguments; and DENIED Petitioner's motion for summary judgment as to his claim of totality of errors. Furthermore, the Court hereby *sua sponte* GRANTS summary judgment to Respondent on Petitioner's claims of unconstitutional malice instruction; prosecutorial misconduct; presumption of innocence and shackling; and prejudicial admission of grenade detonator. Accordingly, the Court hereby DISMISSES Petitioner's claims of unconstitutional malice instruction;

prosecutorial misconduct; presumption of innocence and shackling; and prejudicial admission of grenade detonator.

Although the Court has granted some of Petitioner's claims, because Petitioner has numerous other claims which will be heard soon at the evidentiary hearing, the Court hereby RESERVES JUDGMENT at this time as to issuing the writ of habeas corpus.

Entered this the 4th day of April, 1995.

/s/ John T. Nixon
JOHN T. NIXON,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

APPENDIX D

WILLIAM GROSECLOSE and RONALD EUGENE RICKMAN, Petitioners

vs.

STATE OF TENNESSEE, Respondent

No.9

COURT OF CRIMINAL APPEALS
OF TENNESSEE, NASHVILLE

February 16, 1984

SHELBY COUNTY, HON. L. T. LAFFERTY, JUDGE.
(Post-Conviction).

COUNSEL

For Petitioner Groseclose: Larry D. Woods, William J. Marett, Jr., WOODS, BRYAN, WOODS & WATSON, 121 Seventh Avenue South, Nashville, Tennessee.

For Petitioner Rickman: William P. Redick, Jr., Lionel R. Barrett, Jr., LIONEL R. BARRETT, JR., P.C., 211 Printers Alley Building, Nashville, Tennessee

For the Respondent: William M. Leech, Jr., State Attorney General, Nashville, Tennessee

Gordon W. Smith, Assistant State Attorney General, Nashville, Tennessee

Jewett H. Miller, Executive Assistant, Shelby County Attorney General's Office, Memphis, Tennessee

Henry P. Williams, Assistant District Attorney General, Shelby County Attorney General's Office, Memphis, Tennessee

JUDGES

Byers, J. wrote the opinion, CONCUR: Robert K. Dwyer, Judge, Lloyd Tatum, Judge

AUTHOR: BYERS

OPINION

John K. Byers, Judge

The appellant appeal from the dismissal of their petitions for post-conviction relief in which they seek to have set aside their convictions for murder in the first degree and punishment of death.

Both of the appellants basically claim they had ineffective assistance of counsel at trial and cite a plethora of occurrences at trial upon which they rely as indicative of this. Additionally, they contend they were incompetent at the time of the trial because they were being administered medication which made them unable to understand the proceedings against them and participate meaningfully therein.

After an evidentiary hearing, the trial judge held against the appellants on all of their contentions, and the appellants say the evidence preponderates against his findings.

The judgments are affirmed.

A detailed recitation of the operative facts of the crime as shown in the convicting trial is not necessary or particularly desirable in the review of a post-conviction case. However, to place the appellants' complaints herein in perspective, we note that the Supreme Court in reviewing this case said, "The murder was one of the most

atrocious and inhuman conceivable," and "There was overwhelming proof of the guilt of all three of the defendants."[1] **State v. Groseclose,** 615 S.W.2d 142 (Tenn. 1981).

Clear evidence at trial showed that the murder was precipitated by Groseclose's hiring of Rickman and others to murder his wife. Rickman and Britt went to the Groseclose home on the morning of the crime, entered through a door left open by Groseclose, and raped the woman. Rickman choked her until she was unconscious, then stabbed her, and placed her supposedly dead body into the trunk of her vehicle. Rickman and Britt drove the vehicle to a public library, and despite their knowledge that the woman was alive, as reflected by her cries for help which they heard, left her in the trunk of the vehicle where she died from the effect of the extreme heat. Death was attributed to systemic hyperthermia which amounted to her cooking to death, as characterized by trial judge.

Rickman and Groseclose claim they were incompetent to stand trial because during the course of the trial they were being administered drugs which made them unable to comprehend what was taking place. The record shows each of the appellants was being given medication because of severe anxiety and that they were being given a sleeping pill in the evening.

The physician who prescribed this medication testified it was given within the accepted limits for people under extreme anxiety and that he observed nothing to indicate that the appellants were in any way impaired.

---

[1] A third defendant named Britt received a life sentence and did not appeal the conviction.

The attorneys who represented the appellants at the convicting trial testified that they saw nothing to indicate the appellants were unable to comprehend what was taking place or to rationally assist them.

A pharmacologist, called by the appellants, testified that although this medication might tend to make a person more slow in comprehension, it would not make them unable to function normally or unable to understand what was taking place. The evidence does not preponderate against the finding of the trial judge that the appellants were competent to stand trial. We also conclude that this evidence does not even approach those circumstances held to require a trial judge to conduct further inquiry on the issue. **See e.g., Drope v. Missouri,** 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); **Pate v. Robinson,** 383 U.S. 375, 86 S.Ct. 836, 18 L.Ed.2d 815 (1966).

Groseclose's contentions.

A. Jury Selection.

(1) **Witherspoon** Issue – Groseclose contends his counsel was incompetent because he relied upon his codefendants' lawyers in questioning the jurors, that he made no request to submit questionnaires to prospective jurors for background information, that he made no request for individual voir dire of the prospective jurors, that no attempt was made to rehabilitate prospective jurors who were excused because they opposed the death penalty, that his lawyer failed to exercise all of his peremptory challenges, and failed to challenge the composition of the jury.

In the trial, there were three defendants and four lawyers. In the selection of the jury, Britt's lawyer conducted the major portion of the voir dire of the jury, which included the questioning of jurors in the area of their opposition to the death penalty. In addition, the trial judge questioned the prospective jurors who had voiced an objection to the death penalty to determine if they were indeed unalterably opposed to the death penalty.

On direct appeal, the Supreme Court found that no juror excused for cause was erroneously excused.

Groseclose's lawyer was of the view it was not necessary to get into extensive voir dire of the jury after Britt's attorney and the court had done so. Groseclose contends, however, that had defense counsel hypothesized a set of facts different from the facts in this case, he might have been able to rehabilitate the prospective jurors who were excused for cause. Groseclose characterizes this hypothesizing as a popular method of defense counsel to explore the qualifications of a prospective juror in a death penalty case.

Though this may be a "popular" method of defense counsel, the issue was whether the prospective jurors would be able to consider the entire range of punishment in the case they were trying. We are unwilling to say counsel is incompetent for failure to ask a question of doubtful probity which is based upon an hypothesis not present in the case and is irrelevant to the matter in question. We are cited to no case which has held such hypothetical questions to be either permissible or required.

(2) En banc jury selection – Groseclose complains that his attorney made no independent motion for individual voir dire of the jury. He admits that Britt's attorney made such a motion and it was denied. We cannot fault counsel for not making a motion which would be futile. The question is whether the accused had a fair and impartial jury. There is nothing in the record before us to suggest he did not have a fair and impartial jury, and there is nothing to suggest the jury was irrevocably committed to impose the death penalty. Indeed, this jury did not inflict the death penalty on Britt, who participated in the murder of Groseclose's wife and who was tried in this case with the appellants.

(3) Failure to exercise all peremptory challenges – Groseclose claims his lawyer was incompetent because he failed to exercise all of his peremptory challenges and thus foreclosed the possibility of raising issues on the matter of jury selection on appeal.

If there were in fact some incompetent jurors who sat on the convicting trial, Groseclose did not show this to be the case in the hearing of this post-conviction petition.

He has not shown any right lost to him by the attorney's failure to exhaust his challenges. We are not disposed to invalidate a trial merely on a possibility of some loss to the petitioner.

Furthermore, when an attorney has obtained what is to him, in the exercise of his professional judgment, a jury as a favorable as he believes he can obtain, he would be foolish to exercise a peremptory challenge, where he had no reason to raise an appellate issue, and be faced with

an unknown quality in the venireman called to replace the challenged juror.

(4) Failure to challenge the composition of the jury – Groseclose claims his counsel was ineffective because he failed to challenge the composition of the jury. The record shows that none of the lawyers in this case had any reason to challenge the makeup of the venire called in this case. Groseclose, in the post-conviction proceeding, does not suggest or show any defect therein either. Competent counsel is not rendered incompetent for not doing foolish things. The competent practice of law presupposes that an attorney will make rational decisions upon the facts as they exist. Competency does not require counsel to jump through hoops merely because the hoops may be present.

B. Guilt or innocence phase.

Groseclose testified that his trial lawyer failed to make an independent investigation for the purpose of interposing a defense. The attorney testified he interviewed several witnesses suggested by Groseclose and several not suggested by him. At the post-conviction proceeding, Groseclose testified he wanted the lawyer to call witnesses to show he was not present when his wife was killed. The state's evidence did not suggest Groseclose was present at the time of the offense. The evidence showed he purposely was at the naval base where he had been previously stationed. The evidence which Groseclose wanted shown would not have presented an alibi defense. The lawyer could find no viable defense for Groseclose, and Groseclose did not show in the post-conviction hearing that one existed.

Groseclose further contends the lawyer did not attempt to impeach a witness who testified that after the killing one of the codefendants had possession of rings owned by the victim. He claims these rings were sold prior to her death. Even if counsel could have impeached the witness, we do not see, given the massive evidence of guilt, that the failure to do so prejudiced Groseclose. Groseclose raised other issues under the category which dealt with the medication. We have previously answered this.

Basically the thrust of Groseclose's complaint under this heading dealt with the tactical handling of the trial. There is no showing that this amounted to incompentency of counsel.

C. Penalty phase

Groseclose claims his lawyer was incompetent because he did not present any mitigating circumstances in the punishment phase of the trial. The record shows the attorney called witnesses to testify favorably for Groseclose. Groseclose complains because the lawyer did not put members of his family on the stand. Particularly, Groseclose claims he wanted his mother called. This record indicates Groseclose's mother was terminally ill at the time of this trial and unable to attend. She has since died. Significantly, Groseclose, in this post-conviction proceeding, did not show there were any mitigating factors which could have been shown that were not shown. He only argues that the lawyer should have called witnesses from such groups as Tennesseans Against the

Death Penalty, Southern Prison Ministries, and the American Civil Liberties Union to show sociological and philosophical reasons why the death penalty should not be inflicted. Such evidence is not admissible. **State v. Johnson**, 632 S.W.2d 542 (Tenn. 1982).

D. Post-trial neglect.

Groseclose claims the failure of his lawyer to render adequate post-trial assistance should invalidate the verdict in this case. It appears that he failed to preserve his trial notes and did not order that closing argument be transcribed. Nothing in this record shows anything helpful in the notes or anything prejudicial in the argument. Even if counsel was incompetent in the post-trial function, Groseclose would not be entitled to a new trial on that basis.

If defects occurred, the delayed appeal provision of our statute would grant relief to Groseclose. Furthermore, other counsel perfected the direct appeal in this case, and there is no showing in this post-conviction hearing that Groseclose was deprived of any right or prejudiced by the action of his original lawyer.

E. Failure to grant a continuance because of the lack of a record of the convicting trial.

Groseclose says the post-conviction hearing should have been continued because he was not furnished a copy of the transcript of the convicting trial.

The original trial was transcribed and filed with the Supreme Court at Jackson. The transcript was available at Jackson for review by the attorney representing Groseclose at the post-conviction proceeding. We find

nothing in this record to show that Groseclose was prejudiced by the ruling of the trial judge on this motion.

Groseclose further claims he was prejudiced by the failure of the state to file a responsive pleading. The record does not support this contention and it is without merit.

Rickman's contentions.

A. Investigation and preparation.

(1) Rickman says his attorney was incompetent because he waived the preliminary hearing and thus lost any opportunity to use this vehicle for discovery. The lawyer testified he waived the preliminary hearing because the only witnesses present were police officers, and the news media were in attendance. The lawyer was of the opinion that the publicity from a hearing would outweigh the dubious discovery benefit. We are of the opinion this was a legitimate tactic by the lawyer and does not indicate incompetence.

(2) Rickman contends his lawyer never discussed the case with him or made any effort to investigate the charges against him. The lawyer testified he interviewed Rickman for several hours and discussed the witnesses listed as state's witnesses. Additionally, the lawyer left with him a nine page copy of a confession given by Rickman to officers and asked him to determine what parts were true and what parts were false. A week later, Rickman told the lawyer the entire statement was true.

From this time the lawyer, with Rickman's approval, attempted to negotiate a plea of guilty. When it became obvious this case would be tried, the lawyer obtained

from the state the substance of the testimony to be given by two of three key state's witnesses. The lawyer had the confession of Britt who was a codefendant. Rickman has not alleged that there were witnesses who could have exonerated him, nor did he show in the post-conviction proceeding that there existed any witnesses who could give him a defense. Beyond this, the lawyer testified the state granted him informal discovery of the case against his client within the rules.

The federal courts have held that where informal discovery is obtained, the petitioner must show some prejudice resulting from the lack of further investigation. **See, e.g., Beran v. United States,** 580 F.2d 324 (8th Cir. 1978). Rickman has not shown any prejudice in this matter and cannot prevail on this issue.

(3) Rickman says his lawyer was incompetent because he did not investigate the possibility of entering a defense of insanity.

The record shows the lawyer asked for, and obtained, a psychiatric evaluation of Rickman prior to trial. The most we find in this record is that Rickman was found to be competent to stand trial.

Rickman complains that his lawyer did not obtain copies of reports from mental evaluation done of him at age 16 at an institution in South Carolina. Significantly, Rickman in his post-conviction proceeding makes no claim of mental incompetence at the time of the murder. Furthermore, if the record in South Carolina would show him to have been incompetent it was available to him in the post-conviction proceeding as it was prior to the

original trial. Rickman has failed to show any prejudice in the matter of his mental competence.

B. Jury selection.

The same complaints in this area were made by Groseclose, and what we said in response thereto is applicable to Rickman's complaint about the jury selection process.

C. Penalty phase.

(1) Defense witnesses – Rickman complains that his lawyer did not call any witnesses to show mitigating circumstances at the penalty phase. More significantly, he complains that no effort was made to show he had previously used mind-altering drugs and had previously had a psychological examination at an institution in South Carolina.

Rickman never claimed, either in the trial of this case or in the post-conviction hearing, that he was using drugs at the time the offense was committed or that the examination done in South Carolina would show he was mentally incompetent. If indeed the psychological report would show incompetency, Rickman could have introduced the report in the post-conviction hearing to support his claim. Rather than do this, he asks that we grant a new trial on the supposition that it is possible such defense is viable. This we are unwilling to do.

(2) Rickman's testimony – a more serious issue raised by Rickman involves the testimony which his lawyer elicited from him during the punishment stage concerning his past. The period of criminal activity covered by this inquiry went back to Rickman's young years. The

lawyer had Rickman testify about a great number of previous crimes he had committed, about his use of drugs, and about his association with a disreputable motorcycle gang. In the course of discussing the motorcycle gang, Rickman testified about acts of violence and intimidation in which he participated. None of this testimony would endear Rickman to the jury.

In the post-conviction hearing, the lawyer testified that after the state's evidence was completed in the guilt phase, there was no doubt that Rickman and the others were going to be sentenced to death. Based on this judgment, the lawyer decided that the only thing he could do in an effort to save Rickman was to show his sordid past. the lawyer testified that there was a last ditch effort to persuade the jury that Rickman was abnormal, that he had had a more difficult childhood and history than the normal person in the hope that this would gain sympathy with the jury and avoid a sentence of death.

This approach by the lawyer may very well be described as desperate, with little hope of success. However, when viewed in the light of the overwhelming evidence of guilt of a murder described as "one of the most atrocious and inhuman conceivable," what in hindsight might appear desperate and unlikely of success becomes less startling in the face of the hopeless cause with which the lawyer was faced.

For the most part, those prior crimes which were documented could have been shown by the state as aggravating circumstances. The fact is there are no mitigating circumstances available to Rickman to show. We are therefore not willing to set aside the verdict in this

case on this basis, because there is no showing that it is reasonable to assume that a different result might have occurred had these tactics not been used.

D. Post-trial neglect.

We responded to this issue in discussing the same complaint by Groseclose.

E. Administering drugs.

We responded to this issue above.

In summary, what this record reveals is that Groseclose, Rickman, and Britt were without question guilty of an atrocious murder of an innocent person, that the crime was committed by Rickman and Britt for hire, and that Groseclose hired the others to kill his wife. The appellants have alleged a great number of deficiencies in their attorneys at the convicting trial. In the issue on appeal, neither has asserted any actual prejudice which resulted. They talk rather of possibilities. In the evidence presented by the appellants at the hearing on the post-conviction petition, neither of them showed that any evidence could have been obtained to support these allegations.

In effect, the appellants ask this Court to invalidate these convictions on suppositions which are not supported by the evidence.

Alleged deficiencies of counsel are not sufficient to obtain the setting aside of a convicting trial. The petitioners must show that the conduct of his attorney amounted to incompetency under the **Baxter v. Rose** decision, 523 S.W.2d 930 (Tenn. 1975), which follows the United States Supreme Court rule on competency of

counsel; they must also show they were prejudiced by the action of their attorney. The petitioners have failed in both of these respects.

The evidence does not preponderate against the finding of the trial judge and we affirm his judgment herein.

CONCUR: Robert K. Dwyer, Judge, Lloyd Tatum, Judge